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Robert Schuman Centre for Advanced Studies

European Networking and Training for National Competition
Enforcers (ENTraNCE)

European Networking and Training for National
Competition Enforcers (ENTraNCE Judges 2013)
Selected Case Notes

Edited by Pier Luigi Parcu and Giorgio Monti

European University Institute

Robert Schuman Centre for Advanced Studies

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(ENTraNCE)

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EUI Working Paper **RSCAS** 2015/54

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European Networking and Training for National Competition Enforcers (ENTraNCE Judges)

This series of working papers is published in the context of ENTraNCE Judges, training for national judges in competition law. The training is organised by the RSCAS, with the financial support of DG Competition of the European Commission. In the context of the training programme, selected judges from different EU Member States attend both online and residential training activities in Florence. Each year the training focusses on a different aspect of competition law enforcement that is relevant to the national judiciary.

Information concerning the ENTraNCE Judges training program can be found at: <http://www.eui.eu/Projects/ENTRANCE/Home.aspx>

Each working paper includes the case notes written by the national judges participating in one edition of ENTraNCE Judges. In the context of the training activities, in fact, each participating judge is requested to summarise and to comment on a national judgement that is related to the field of competition law. The working paper thus aims to increase understanding of the challenges faced by the national judiciary in enforcing national and EU competition in the context of the decentralised regime of competition law enforcement introduced by Reg. 1/2003.

Abstract

This working paper includes a collection of case notes written by the national judges who attended the European Networking and Training for National Competition Enforcers (ENTraNCE Judges 2013). The training programme was organised by the RSCAS between February and November 2013, with the financial contribution of the DG Competition of the European Commission. The case notes included in the working paper summarise judgments from the different EU Member States that relate to different aspects of competition law enforcement. The working paper thus aims to increase the understanding of the challenges faced by the national judiciary in enforcing national and EU competition in the context of the decentralised regime of competition law enforcement introduced by Reg. 1/2003.

Keywords

Competition law; Art. 101 TFEU; Art. 102 TFEU; Reg. 1/2003; judicial training, national judges.

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1. Introduction to the Collective Working Paper

Giorgio Monti and Pier Luigi Parcu

Introduction

This working paper includes a collection of case notes written by the national judges who attended the European Networking and Training for National Competition Enforcers (ENTraNCE Judges 2013). The training programme was organised by the RSCAS between February and November 2013, with the financial contribution of the DG Competition of the European Commission. The case notes included in the working paper summarise judgments from the different EU Member States that relate to different aspects of competition law enforcement. In this introduction we briefly recall the cases and elaborate on some shared themes that arise from the decentralized enforcement of antitrust rules across the European Union.

The Scope of Application of the Competition Rules

Judge McGovern's discussion of *Medicall Ambulance Limited v. Health Service Executive* illustrates how the Irish courts are committed to applying principles from the ECJ to the interpretation of national competition law, even when this risks sitting uneasily with the national statutory provisions. In the case at hand the issue was whether the defendant as an 'undertaking' even if it was not operating to make profit. This caused some difficulty because the national legislation defined undertakings as entities that operate 'for gain.' Notwithstanding this explicit statutory language the national court managed to find that the defendant did operate as an undertaking because while it did not make profits it was *gaining* from its policy of discriminating against its rivals. This is also one of several cases in this collection that involves private enforcement, indicating an increased activism in this field. Still on the question of the scope of application of the competition rules, Judge Calgano's analysis of *Atlantica v Coutnav* rejects the application of the competition rules in cases where the defendant is a public law entity in Tunisia and under principles of international law it enjoys immunity. The case is also noteworthy for the possibly questionable suggestion that blocking access of a ship on the route from Genova to Tunis would not affect trade between Member States, which might require further discussion, not least in light of the judgment in Case C-306/96 *Javico v YSLP* which suggests a more careful assessment of the facts. A similarly restrictive interpretation of the effect on trade is found in *Portuguese Competition Authority v. Baxter – Médico Famaracêutica, Lda and Glinnt – Business Solutions, Lda*, discussed by Judge Nogueira. On the facts two firms colluded to exploit their position in the market for the sale of a billing system and it is not a remote possibility that non-Portuguese suppliers might be considering entry into the Portuguese market, so the pattern of trade could be affected even if the likely immediate scope of the agreement is domestic.

Procedural Issues

Convergence between national and European norms is of course much more complex when it comes to matters of procedure. Judge Simplis takes us through the various stages of the litigation in the cartel for milk production in Greece and notes the careful manner in which fundamental rights considerations inform the analysis of issue such as the role of presumptions, access to the file, and the impartiality of the decision maker. Likewise, Judge Ungureanu discusses a procedural issue which was addressed for the first time in Romania in *S.C. Alpiq Romindustries s.r.l. v. Romanian Competition Authority*. Here the court had to determine how far legal and professional privilege applied. It will be recalled that on this point the ECJ has indicated that national rules diverge on the scope of this

principle so that there can remain differences. On the facts the issue was resolved by noting that the document under question had been prepared before the antitrust authorities had begun procedures and so could not constitute a document worthy of protection. In Portugal, Judge Assunção finds that in *Association of Navigation of Portugal (AGEPOR) v. Portuguese Competition Authority* the court explored the right of access to documents by the defendant and examined closely the privilege against self-incrimination, serving as a reminder of the importance to safeguard the accused's fundamental rights. More controversial in Portugal is the power that courts have in revising the fine set by the NCA upwards, which Judge Roque reports in *Madeira's driving schools SMTZ and others v. Portuguese Competition Authority*. This is in line with the powers of the ECJ under EU Law, but there is some disquiet among some jurists as to whether this power is appropriate: in criminal cases normally appeal courts may only revise a penalty downwards and to some a similar approach should be followed in competition cases given the quasi-criminal nature of the procedures. An element to consider on evaluating the issue is if the deterrence aim pursued by the fining policy is to be left only to the NCA's assessment or if it should be re-examined by the court in all possible directions.

Of much practical significance is Judge Paneda Usunariz's discussion of *BCN Aduanas y Transportes v. Spanish Competition Authority*. Here the Spanish court held (in a manner similar to the German courts) that the 10% turnover ceiling for a fine should be interpreted as the maximum fine that the authority may impose, and not as a ceiling. It held that this was based on the protection of the rule of law, whereby the defendant had to know what the maximum fine could be. This can have significant effects on the way the fine is appraised. In the approach of the Commission, suppose the basic amount is EUR 10 million, then the Commission will consider aggravating and mitigating circumstances to determine if the fine should go up or down. Suppose that the aggravating circumstances lead to a fine of EUR 15 million but that this is above 10% of the defendant's turnover: then the fine will be reduced. However, under the approach suggested by the Spanish Court here, the NCA would first have to determine what the maximum fine could be and so identify what percentage of the turnover would reflect the gravity of the offence under consideration. So for instance it may be that the ring leader of a cartel would merit a fine amounting to 9% of turnover, the fine would then be calculated on this finding. The two approaches could lead to divergent results in a good number of cases, and it may well be that the ECJ will one day be called to determine whether this approach espoused by the Spanish and German judges is in line with EU law by asking if it allows for effective enforcement of the competition rules. It is perhaps surprising that while the Spanish courts make a good number of references to the ECJ to clarify issues pertaining to distribution contracts between oil companies and petrol stations, when the law appears fairly well settled, an extremely controversial procedural matter as that identified in these cases has yet to receive a reference for a preliminary ruling.

Damages Actions

The struggle to introduce the principle of full compensation for antitrust violations indicated by the ECJ to the Member States in their judicial practices is still undergoing. Three judges comment on follow on actions and the legal force of decisions of the national competition authority. Judge Puccini covers the important judgment of *Pasquale Savarese v. Lloyd Adriatico S.p.A.* where the court held that a finding of a cartel leads to a presumption that prices have been increased, which may be rebutted by the defendant but then the defendant must show with precision that the price increase has other causes than the cartel. On the facts the defendant had suggested that high insurance prices in Italy have to do with issues like the high number of fraudulent claims, but this general observation was not sufficient to show that the defendant's prices were not further raised as a result of the cartel. In contrast, Judge Todorova reports that the Bulgarian courts have placed the onus of proof on the plaintiff to show a causal link between the infringement and the harm, although this (*X v Z Ltd*) was a case of unfair competition that would fall outside the scope of the EU antitrust prohibitions. Nevertheless, this contrast illustrates the relevance of the Damages Directive to codify aspects of

private enforcement. Judge Goda's discussion of *Šiaulių tara v. Stumbras* gives a scenario where the defendant appeals both the decision of the Lithuanian competition authority on the merits (i.e. it challenges whether the findings of a restrictive practice were made out) and contests the damages award. This is somewhat unusual in that normally the defendant will appeal the decision directly. On the damages award the Court of Appeal applied general principles of civil law and recalled the deference that should be afforded to court appointed experts who are called upon to estimate the losses suffered by the plaintiff.

Judge Todorova returns to the difficult issue of causation in her commentary about *I.B. AD v. Bulgarian Telecommunications Company EAD*. Here the claimant sought damages because the defendant provided discriminatory access so as to raise the claimant's cost on the retail market for dial-up internet. However, because of the growth of cable access to internet it was not possible to prove that the defendant's abusive conduct was the reason for the claimant's fall in profits.

Some of the difficult issues raised in these cases, especially those related to the value of the NCA's decision for the courts and of the issue of causation, at least for restrictive agreements, have found more precise answers in the new Damages Directive.¹

Anti-Competitive Agreements

Judge Zenkova allows us to follow up on the ECJ's judgment in the *Slovenská Sporiteľňa v. Slovakian Competition Authority* case. It will be recalled that here three national banks had agreed to boycott a new financial services provider and the question arose whether the alleged illegal operation of this new entrant was relevant in assessing the application of Article 101. The ECJ's negative answer was followed to the letter by the national court, and in particular the national court noted that, on the facts, the cartel members only mentioned their concerns about the illegal conduct of the new entrant after the NCA had begun investigating the cartel, perhaps indicating that the defence was a pretext.

Judge Calciagno discusses the role of leniency applications in *Butangas Spa and Liquidas Spa v. Italian Competition Authority* where the administrative court explained the evidentiary power of leniency applications, reminding us that whilst the information contained in a leniency document is important, one should also ensure that it is corroborated by other items of evidence.

Judge Maciejewski highlights a bidding cartel where the cooperation between the two competitors was very intense and where the court took its time to explain the role of competition law enforcement in these kinds of cases, identifying the reasons for the prohibition and the purpose of fining policies. It is likely that this case, *Eksortus and Specialus Montażas – NTP v. Lithuania Competition Authority*, will serve as an important precedent, not so much for the points of law it makes, but for explaining the competition culture which antitrust laws are designed to bring about. Similarly Judge Szabó's discussion of a similar cartel in Hungary (*Adeptus Zrt. and others vs Hungarian Competition Authority*) reveals how bid rigging remains a major concern and a widespread antitrust violation across the EU.

Judge Usunariz reports on one of a good number of disputes that surfaced in Spain with respect to the arrangements between petrol supplies and petrol stations, *TOBAR v. CEPSA, Estaciones de Servicio S.A.* This helps us trace the implementation of a reference for a preliminary ruling back into the national court, where we note how closely the reasoning of the ECJ is followed. What appears from this case is how a range of issues that require resolution remain to be determined. For instance, in this case the issue of the voidness of the contract came up, however, a more detailed consideration of

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

the impact of the voidness of a specific clause with the validity of the contract as a whole still appears as an open issue that could benefit from a full discussion by the ECJ.

Regulated Sectors

One of the more tricky fields for the application of competition law is that of industries that are regulated for public interest reasons. For instance, judge Raycheva highlights the tension between the regulation of the medical profession and the antitrust rules in *Bulgarian Medical Association v. Bulgarian Competition Authority*. Here the NCA challenged a decision of the association to stipulate minimum fees for certain medical services, while the association had seen that this fee structure was necessary to guarantee the quality of service delivery. In this kind of discussion (competition v quality) the guidance from the ECJ is thin and, on the light of precedents, it may be difficult for the association to claim that price fixing is ever a proportionate way of ensuring quality of service provision; however the matter requires further discussion by competition authorities. The regulation of the medical profession also came under antitrust scrutiny in Portugal, in *Association of Doctors of Portugal v. Portuguese Competition Authority* where again the issue of price fixing was at stake. Here the national courts considered and confirmed the competence of the NCA to apply the law to associations of undertakings; as Judge Assunção notes, it is very significant that the Constitutional Court heard this case, not least as the NCA had pursued a number of professional associations, thus its stance was legitimized. Further legitimation came from the ECJ, as judge Roque reports on *Ordem dos Técnicos Oficiais de Contas v. Portuguese Competition Authority* where the ECJ explained the role of competition law in sectors with professional associations, affording some protection from the application of competition law only when restrictive practices are strictly necessary for the proper performance of the service in question.

Another important principle was settled very elegantly in *Orthopaedic companies and National Health Insurance Fund (NHIF) v. Lithuania Competition Authority*, discussed by Judge Gida. Here the parties claimed that their collusion was required by the national regulatory framework, but the court noted that the scope for this line of argument is very limited indeed and on the facts found that the regulator had not eliminated all scope of competition among the defendants. A similar issue arose in Judge Pieńkowska's case note, *Stalexport Company v. Polish Competition Authority*. The NCA had fined the owner of a stretch of motorway for charging users a toll charge even during a time when the road was under repair and traffic was limited severely. Again here the fact that the regulatory system authorized the charging of fees to road users was not sufficient to constitute a defence under the domestic law on abuse of dominance because the regulatory framework did not require a fee be levied, and it was thought unreasonable to continue to require toll charges when the road was being repaired so extensively.

An alternative way of seeing the state's involvement is to consider whether the state, in regulating a particular market, itself acts as an undertaking. An interesting case taking this approach is reported by judge Mac Eochaidh, *Island Fisheries Teoranta v. The Minister for Communications, Marine and Natural Resources*. Here it was found that it was plausible that the fees set by a minister for use of an essential facility could constitute an abuse of dominance and damages could be claimed by those harmed by the excessively high harbor charges.

These cases in this section are a reminder that it would be wise for regulatory frameworks to be revised systematically to ensure either compliance with EU competition law or, if necessary, to explore how to balance the demands of competitive markets with other public interests. The role of an NCA as a competition advocate – encouraging Ministers and regulators to consider the competitive effects of their practices might be a viable substitute to litigation.

Abuse of Dominance

It is trite law that all abuse cases start with defining the relevant market. Judge Puccini brings to our attention a very close judicial review of this issue in *CETEL S.N.C. and others v. ENEL S.p.A.* The courts paid close attention to the Commission's Notice on market definition but also noted that the approach to determining the market had to be commercially realistic from the start, so that identifying the defendant's business model and its competitors would be a useful starting point for trying to work out demand and supply side substitutability – simple reference to the business of the accused is not enough to find dominance.

Judge Szabó notes the very well-known difficulties in litigating cases where the abuse is exploitative, as in *Private Radio Broadcaster v. State-owned Hungarian radio company*. Here the private broadcaster was sued for failure to pay the radio company. This dispute arose because the defendant had originally signed up to a long term deal whereby the plaintiff agreed to broadcast a significant amount of hours. Later the defendant scaled down its ambitions and broadcast fewer programmes but still had to pay the sum under the original contract. While it was clear that the plaintiff's insistence caused harm the court found that there were good reasons for it to insist on being paid in light of the investments it had made.

However, even exclusionary abuse cases may prove tricky, Judge Raycheva's discussion of *Vitosha Ski AD and others v. Bulgarian Competition Authority* illustrates how difficult it is to classify and identify exclusionary practices when the dominant firm seeks to protect or expand its dominant position. Here the NCA and two appellate courts all interpreted the essential facts in a divergent manner. Likewise, in Judge Ernitis' discussion of *Estonian Competition Authority v. Estonian Post* we find courts differing on whether the dominant player had indeed foreclosed market access by discriminating against rivals. Part of the difficulty might be that the ECJ's case law has set out fairly precise rules for identifying certain types of abuse, but classifying less frequent or recognizable conducts in these stylized types is often tricky.

Judge Titisias's annotation of *Greek medicines distributor v. GlaxoSmithKline* allows us to see how the ECJ's case law on the parallel trade in pharmaceuticals is received in the domestic courts. On the facts it was held that a dominant firm abuses its dominance if it refuses normal orders from its distributors. As Judge Titisias astutely remarks, there seems to be a slight discrepancy between the advice of the ECJ and the approach of the Greek court: while the ECJ appeared to suggest that a refusal to honour an order would be abusive having regard to both the size of the order and the previous business relationship between the parties, the Greek court appears to consider only the former. As the learned judge notes the Greek court's position is probably to be preferred because the point is to prevent the market partitioning effect of the dominant firm's conduct.

Judge Chavdar brings to our attention a case which seems to show the inadequacy of using competition law, *Ethna Cargo v. Bulgarian Competition Authority*. The claimant was the client of a telecommunications operator. He asked to terminate the contract and move to another telecoms operator (there are two others on the Bulgarian market) but the defendant promised better terms, so the claimant stayed. Then the defendant did not do as promised. At this stage, one would naturally consider that the claimant has a cause of action in damages for breach of contract and/or misrepresentation. However the claimant brought the matter to the NCA. It and the courts had to then struggle with the slippery question of whether there was an abuse of a collective dominant position in view of the onerous terms set by the defendant for rescinding the contract and transferring the numbers to another supplier. In the end the court failed to find collective dominance. However, this case would appear to be a matter for the national regulator, rather than the competition authority. The antitrust aspects of the case are very tricky indeed for the scope of the notion of collective dominance remains still quite unclear even in ECJ's jurisprudence.

Judge Neimanis identifies a set of three cases which concerns buyer power, *Maxima Latvija and others v. Latvian Competition Authority*. This discussion is valuable because the Latvian legislation

contains a specific article addressing abuse of buyer power and the cases illustrate the varying ways by which powerful buyers can take advantage of their position to impose onerous terms on their suppliers. However, here one wonders if the rules are not being applied to behavior that damages competition, or just to conduct that is unfair. The difficulty in drawing this borderline is even more pronounced in Judge Pieńkowska's discussion of *Getin Noble Bank v. Polish Competition Authority*, where a bank's imposition of excessive charges on clients was condemned, more for their unfairness than for their anticompetitiveness. In this instance the NCA has competence to apply both consumer and competition law, and at times the two provisions may appear in tension with each other: if a customer finds high charges in one bank, surely she can find another bank to contract with? In other words, if a market is competitive does one need consumer law as a market protection instrument? Besides its normal role as a contractual protection instrument? A clear answer to this type of doubts it is still lacking and national case laws reflects the uncertainty.

A Brief Conclusion

As with earlier working papers materializing from this training programme, we observe judges and competition authorities drawing on the EU Law *acquis* to inform their approaches, indicating an increasing degree of substantial convergence among the Member States. **Legal provisions are generally aligned and the choice between the use of EU law or national laws, always based on the effect on trade test, normally does not have any substantive consequence on the merit of the case. Only rarely, some specific national provisions, most of the time essentially pertaining to confining fields, like unfair competition, may still cause some minor discrepancy in the application of competition principles.**

At the same time, even if the substance is converging, we undoubtedly find that national procedural autonomy may sometimes lead to slightly different approaches across jurisdictions. In this regard, it is helpful to also be able to trace the story of cases that have gone to the ECJ on preliminary rulings and to be shown how these are concluded, often with very subtle and helpful readings of the guidance from the ECJ. Nonetheless, some remaining uncertainties may require for the future an increase in referral to the ECJ or maybe even a more frequent request of support to the Commission in dubious instances.

As in the past, the cases discussed below show that “new” Member States are more likely to face “antique” anti-competitive behaviours, such as open air cartels and difficult cases of exploitative abuses. While this is an admittedly small sample, what might be remarked is how “domestic” most of the cases taken up by NCAs are, at times indeed the view is taken that there is no effect on trade so that only national competition law applies. This suggests that many markets remain local, but also that it is perhaps in local markets where a “competition culture” has yet to filter through.

Diverging public interests and sometime uncertain boundaries between competition laws and other laws, especially in traditionally regulated sectors, show up frequently in the cases presented. In this regard, it is particularly encouraging to see that many NCAs do not avoid challenging established practices in traditionally regulated sectors when these impede entry by new competitors.

All in all, when judging from the cases presented in the ENtraNCE Judges 2013, convergence in Member States' enforcement of competition law is continuing to advance, both in the themes treated and in the solutions proposed. The area of discrepancy is reducing essentially to procedural matters and to few very specific national provisions, but fundamental misunderstandings or differences in interpretation of substantive competition law are becoming increasingly rare.

2. The Scope of Application and Procedural Aspects of Competition Law Enforcement

2.1. Brian Mc Govern (High Court, Ireland), *Medicall Ambulance Limited v. Health Service Executive*

Introduction

This was a judgment given by Mr. Justice Cooke on 8th March, 2011, in an application for judicial review. The case is of interest because it involved a preliminary ruling on the application of the definition of ‘undertaking’ in the circumstances which arose. In the course of his judgment, Justice Cooke obtained assistance from the approach of the Court of Justice in similar circumstances in Case C-475/99, *Ambulanz Glockner v. Landkreis* [2011] ECR I-8089. That case was concerned with an allegation of the abuse of a dominant position by a number of voluntary non-profit organisations endowed with public functions under the German law for the provision of both public Emergency Ambulance Services and services licensed for general patient transport.

Facts

In the *Medicall Ambulance* case, the plaintiff company was the owner of a fleet of ambulances and carried on the business of providing the service of patient transfer by ambulance for members of the public and their insurers and to hospitals and other healthcare facilities, including hospitals and facilities operated by the defendant.

The defendant is a statutory body established under Irish legislation to discharge a wide range of functions in relation to the provisions of healthcare and personal and social services in the State. In addition to its responsibilities for managing and operating hospitals and other facilities and providing medical care, the defendant has roles of a general, social and public character to promote the improvement and protection of health, safety and welfare, and functions of an advisory, educational and regulatory nature. Among its functions is the provision of ambulance services through its National Ambulance Service. In a total national fleet of approximately 460 ambulances, approximately 400 are operated by the National Ambulance Service and approximately 60 by private operators. Of the fleet of private ambulances, 22 were operated by the plaintiff.

In order to operate the National Ambulance Service, the defendant maintained a network of eight regional ‘call centres’ or ‘ambulance control centres’. These processed requests are received from hospitals and other facilities for the provision of an ambulance to transport a patient to or from a hospital, or between hospitals, and it allocated the job to an operator. In the case of the transfer of a public patient, the job was allocated to a vehicle in the National Ambulance Service. If none was available, then recourse was had to a private operator. The services of the private operator for public patient transfers were provided under a ‘framework agreement’ that was concluded by the defendant with three operators provided following a public procurement procedure. In the period which was relevant to the proceedings (1st January, 2008. to 31st January, 2011), the plaintiff was one of the three operators in question.

In the case of a transfer of a private patient, the job was allocated to a private operator, or one of a number of private operators nominated by the patient’s health insurer. If no such operator was available, the job would be allocated to a vehicle in the National Ambulance Service. In that case, the defendant would invoice its charges directly to the responsible health insurer on the basis of ‘cost only’. At the judicial review hearing, the plaintiff estimated that the annual value of the market for private patient transfers was approximately €8m to €10m.

In the judicial review proceedings, the plaintiff challenged the legality of an arrangement described as the 'Booking Protocol' which, it alleged, was unilaterally introduced and imposed by the defendant in November, 2008, and which was operated by it until December, 2010.

The Ruling of the High Court

In the course of his judgment, Justice Cooke set out the nature of the Booking Protocol and, in particular, the protocols for private patients who were covered by current private health insurance at the time.

The plaintiff's challenge to the decision to introduce the Booking Protocol was based on two main grounds; (i) that its introduction was *ultra vires* the statutory powers of the defendant, and (ii) that the action of the defendant in imposing the Protocol infringed s. 5 of the Competition Act 2002 (as amended) and was an abuse by the defendant of its dominant position in the market for the provision of ambulance services for the transfer of private patients in the State.

In the Irish Competition Act 2002, the rule prohibiting the abuse of a dominant position is set out in s. 5(1) which states:

'Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.'

The term 'undertaking' is defined in s. 3 of the Act as meaning 'a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service'.

For the plaintiff to succeed in its application, the court first had to be satisfied that the defendant was to be treated, in the circumstances outlined, as an 'undertaking', as defined in s. 3 of the Act.

In his judgment, Justice Cooke carried out an extensive review of cases in the Irish courts and the ECJ on what constitutes an 'undertaking', as meant by s. 3 of the Competition Act 2002, and Articles 101 and 102 TFEU in European Union law.

In *Deane & Ors. v. The Voluntary Health Insurance Board* [1992] 2 I.R. 319. The Supreme Court had to consider the definition of an 'undertaking' in the context of services provided by the defendant (a health insurer) as a statutory body incorporated under the Voluntary Health Insurance Act 1957. The issue turned upon the use of the expression 'for gain' in the definition. In the High Court, the learned judge reached his decision on the basis that the words connoted 'for profit', but the Supreme Court disagreed, holding that the true construction of the section is that the words 'for gain' connote merely an activity carried on, or a service supplied in return for a charge or payment.

Justice Cooke, in his judgment, pointed out that in the case law relating to Articles 101 and 102 TFEU, where there is no definition of 'undertaking' and therefore no element of being 'engaged for gain', an entity will be considered to act as an undertaking where it is engaged in an economic activity. He referred to *SAT Fluggesellschaft mbH v. Euro Control* [1994] ECR I-43, where the ECJ held that 'the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'. He also referred to *Pavel Pavlov & Ors. v. SPMS* [2000] ECR I-6451, where the court held that 'any activity consisting in offering goods and services on a given market is an economic activity . . .'

He concluded that, under European Union law, the obtaining of a charge or payment in return for the goods or services offered is not an essential ingredient. However, he also said that it was equally clear that the taking of payment, or the making of a charge for a service, does not of itself necessarily characterise the entity as an economic operator and therefore as an undertaking.

In *Carrigaline Company Ltd. v. Minister for Transport* [1997] 1 ILRM 241, at 290, Justice Keane held that the Minister for Transport was not acting as an 'undertaking' within the meaning of the

definition when issuing television retransmission licenses under the Wireless Telegraphy Acts, notwithstanding the fact that a substantial initial levy, together with an annual fee based on turnover, was the price of the license. Similarly, in the Euro Control case, the ECJ held that it was not an undertaking and that the collection of route charges by the organisation could not be separated from the organisation's other activities. Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services, and that in collecting them, Euro Control can be regarded as a public authority acting in the exercise of its powers relating to the control and supervision of air space, which are typically those of a public authority. They are not of an economic nature that justifies the application of the Treaty Rules of Competition.

Justice Cooke went on to deal with some cases where a public authority (including a Government Minister) while principally engaged in activities of a public interest and non-economic character, may, in certain circumstances, be treated as an undertaking if and when economic activities are engaged in, and goods and services are offered by it, to the market. The determination of the issue as to whether an activity falls within the exercise of public powers, or as an economic activity, must be carried out separately for each activity exercised by a given entity. See C-49/07 MOTOE [2008] ECR I-4816. Justice Cooke concluded that 'neither the objects for which a body or organisation has been established nor the basis of its financing, nor the fact that it carries on predominantly public interest and non-economic activities prevents the entity being classed as an undertaking for other activities, even when those activities may be merely incidental to its main area of operation'.

He went on to hold that, in assessing whether the particular activities of a public body may be economic activities attracting the categorisation as an 'undertaking', it may be a relevant but not a determining consideration that the particular activities are typical of, and capable of being, provided by private operators, especially when the services are offered on a market where such private operators are already active. One has to ask 'what is the entity in question actually doing when it engages in the conduct sought to be impugned?'

Having considered the facts in the case before him, Justice Cooke concluded that '... the conduct of the defendant in introducing and effectively imposing upon private operators, including the plaintiff, such a regime for the allocation of ambulance service requests, has, in these circumstances, the necessary indices of an economic activity which bring the conduct within the scope of the definition of 'undertaking' in s. 3 of the Act of 2002.' Justice Cooke's reasons are set out in the judgment. Among the matters Justice Cooke took into account was the fact that the provision of ambulance services within the State includes a number of private operators who are in competition with one another and, to a degree, with the National Ambulance Service. The learned judge concluded that it was clear that the services in question were provided 'for gain'. Although the HSE emphasised the fact that its charges were calculated exclusively by reference to the cost incurred by the HSE, and that no element of profit was included, Justice Cooke decided that profit was not a necessary ingredient for being 'engaged for gain'.

The Court adopted the approach of the Court of Justice in Case C-475/99, *Ambulanz Glockner v. Landkreis* [2001] ECR I-8089. In that case, the Court was concerned with an allegation of the abuse of a dominant position by a number of voluntary, non-profit organisations endowed with public functions, under German law, for the provision of ambulance services, both Public Emergency Services and services licensed for general patient transport. Although the questions referred to the Luxembourg Court for a preliminary ruling were mainly concerned with the extent to which the abuse of a dominant position applied to a public undertaking endowed with special or exclusive rights in the context of what was then Article 90 EC (now Article 106 TEFU), the Court had to consider the concept of 'undertaking' when applied to the non-profit medical aid organisations concerned. The ECJ held that it is the essential nature of the service, and the circumstances in which it is offered or provided, which determine whether it is an economic activity. The fact that it is provided because the organisation in question has taken on a public duty to do so, does not prevent it being characterised as an economic activity.

Comment

In the Irish case, Justice Cooke determined that the activity of the defendant in providing ambulance services and prescribing the manner in which services by private ambulances will be performed, and the manner in which transfer jobs will be allocated, is that of an ‘undertaking’. He also held that where a public body has a variety of roles and functions, the different activities which these involve will fall to being analysed separately for the purpose of applying competition rules and the notion of ‘undertaking’. In his judgment, Justice Cooke quoted from the opinion of the Advocate General in the *Ambulanz Glockner* case, when he said that ‘the basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could at least, in principle, be carried out by a private actor in order to make profits’.

The case comprises an interesting analysis of what is an ‘undertaking’ and what are the relevant considerations or indicators to be taken into account when assessing that question in Irish domestic law and having regard to the decisions of the ECJ. In particular, the case provides a useful discussion on whether or not a body can be an ‘undertaking’ if it acts on a ‘non-profit’ basis. This is useful in the Irish context, having regard to the definition of ‘undertaking’ contained in section 3 of the Competition Act 2002, which refers to an individual body corporate, or other body engaged ‘for gain’ in the production, supply or distribution of goods or the provision of a service.

2.2. Lorenza Calcagno (Court of Genova, Italy), *Atlantica v. Cotunav*

Facts

Atlantica has filed a suit asking for an injunction in respect of all the defendants and particularly:

1. An order to the Tunisian Ministry of Transport and the country's Merchant Navy and Ports Authority (OMMP) to permit the Atlantic ships (those called ro/ro ships) to enter the harbor of La Goulette;
2. An order to Cotunav not to moor (or, in general, not to operate) in the Port of Genoa through a Rebora or Tirrenia agent and, in consequence, an order to Rebora and Stazioni Marittime not to work on the mooring of Cotunav's ships.

As a matter of fact, Atlantica told the Court that it had obtained, on November 6th (2012), permission to work with ro/ro ships on the line between Italy and La Goulette, Tunis, but on the 23rd November, OMMP denied an Atlantica ship permission to enter the port of La Goulette because of the traffic. The plaintiff has asserted that the reason given for the denial was untrue because permission was given, at the same time, to other ships. The suit was filed by Atlantica on the 1st December. As a matter of law, the plaintiff stated that the behaviour was a violation of the internal reciprocity principle (as fixed in Article 16, Preleggi Italian Civil Code);

1. a violation of the treaty between Tunisia and the EU (the Euro Mediterranean Agreement) that created an organised scope in order to apply the competition rules and access to the service's market;
2. a violation of internal unfair competition rules.

In reference to the second point, Atlantica asserted that Cotunav, (which holds a monopoly in the Tunisian market for ro/ro shipping lines) and OMMP agreed in order to exclude the Plaintiff from the market, and this was a clear violation of the rules of the Treaty, particularly of Articles 56 and 102, etc. Atlantica argued the existence of an abuse of a dominant position that was created by the agreement between the private company, Cotunav, and the Authority of the Port of Tunis, OMMP.

Judicial Proceedings

In the First Instance, the judge declared the existence of an agreement between Cotunav and OMMP in order to discriminate against the Italian shipping line in respect of the relevant market in competition with the Tunisian shipping line, and that the refusal of entrance to the Port of La Goulette was not caused by a real traffic jam problem, but the judge stated it was impossible to pronounce the injunctions that had been requested because of the quality of OMMP, a public subject on which Italian Judges cannot deliver a judgment.

Atlantica filed an appeal against the decision, asking that Cotunav and OMMP be ordered separately to repair competition on the Genoa-La Goulette line for ro/ro ships and, as a consequence, to let Atlantica's ships enter the Port of Tunis and to order Cotunav to stop the line in order to avoid the strengthening of the dominant position of the defendant. For the comprehension of the Euro Mediteraneo Treaty, Atlantica asked the Court, as judge of the Last Instance, to question the Court of Justice on whether the rules of the UE treaty 101 and 102 can find direct application in the agreement with Tunisia. Atlantica observed that an Italian Judge, as a Community Judge, must pronounce on whether the market is not ruled as competition law required and, in the case filed, the order can be made by looking at the fact as a violation of rules 101 and 102 of the treaty. Atlantica recalled also the theory of effects, in order to indicate the power of the judge to pronounce.

The Court decided as follows:

- 1) the principle of reciprocity is not violated, because it is referred to in the sense of the general situation;
- 2) the OMMP is a public subject and so it is not possible for a judge to pronounce an order; the international law, and the principle of sovereignty prevent it from falling under the power of the Court;
- 3) the Treaty indicates that there is no direct application of the rules of European competition law and it is not possible to pronounce using the theory of effects because of the distortion of the market; the agreement occurred in Tunisia and not in Italy; the Genoa-Tunis line is not a 'sea highway', and it has no community relevance because Tunisia is outside the community market.

Comment

The case summarised here has several different interesting matters for discussion. In particular, the question is whether EU competition law can be relied upon to sanction an agreement between a foreign public entity and a private undertaking that is operating outside the EU. In the case, the Court decided that the most important points were the nature of OMMP and the limits arising from international law. Perhaps, the plaintiff could find a different defence by asking for an injunction relating to the unfair rules that are working in the internal market.

2.3. Iannis Symplis (Council of State, Greece), *Milk producers v. Greek Competition Authority*

Facts

The Greek quota for milk production under CAP² was (and probably still is) barely sufficient to cover local demand for ‘High Temperature Short Time’ (HTST) milk. The rest of the dairy industry’s needs (for extended shelf life (ESL) and ultra-heat treatment (UHT) milk, condensed milk, sour milk, cream, yoghurt, and also for ice-cream and cheese) are covered from imports. Due to the short shelf life of HTST milk (5 days, including the day of processing), there is no supply substitutability for local production³. In theory, thus, even though practically all of the local production comes from very small holdings, this lack of supply substitutability should have provided some counterbalancing power to dairy farmers, against the considerable industry concentration at both the processing and the retail level (the combined market share of the 5 biggest processors is around 70%; at the retail level; supermarkets have a 70% share of the dairy market; and in the big cities, particularly Athens and Thessaloniki, the lion’s share of the supermarkets’ market was divided among five undertakings – one of whom filed for bankruptcy in 2011).

Then, in June, 2005, a flurry of press releases from dairy farmers’ and consumers’ associations, and parliamentary questions from MPs representing rural areas with a strong concentration of dairy farming, triggered an investigation into the dairy industry by the Competition Commission (CC). The investigation led to two separate procedures coming before the CC. The first involved a series of horizontal agreements and concerted practices between milk processors, affecting both the upstream and the downstream markets, which had all the characteristics of a single continuous infringement, but were dealt with by CC (DEC. 373/V/2007) as three separate infringements. Of these, the infringements affecting the downstream market were punished with a gentle rap on the wrist; only one undertaking contested the CC’s findings, but on only one of those infringements, and that not very vigorously. As for the infringement affecting the upstream market, the CC concluded that milk processors had held a number of meetings under the auspices of their trade association, in the course of which they had agreed on a coordinated strategy to force milk farmers to accept lower prices, and to pass on to the industry part of the subsidy they received under the CAP. As a part of that strategy, they agreed that they would refuse to deal with any farmer attempting to switch from one processor to another, or with small cheese processors attempting to resell their surplus milk supply. The second procedure involved a string of resale price maintenance agreements between each processor and the supermarket chains (DEC. 369/V/2007).

Judicial Proceedings

The CC concluded that, since the agreements covered the whole of the national market, they potentially affected the trade between member-states, and, on that basis, concurrently applied both Art. 81 TEC (101 TFEU) and its domestic identical twin, Art. 1 of Act 703/1977⁴, but none of the grounds

² See particularly Action Program 2000 and R. 3950/92, 1255/99 and 1788/2003

³ Except possibly in the North East, where there is the option of imports from Bulgaria and, at a pinch, the North West, where imports from Italy may be an option. The CC, having already concluded that any agreement affecting the whole of the national territory, by its definition potentially also affects the trade between member-states, did not consider it necessary to examine the question of supply substitutability.

⁴ Act 703/1977 has already been replaced by Act 3959/2011. Art. 1 and 2 of the new act, just as Art. 1 and 2. of Act 703/1977, are identical to Art. 101 (para. 1 and 3) and 102 of the Treaty. Art. 3 of the Act is equivalent to Art. 101 para. 2 of the Treaty.

that had been put forward turned on the issue of whether national or EU law should have been applied, nor was there any indication that this *concoure idéal d'infractions* had affected the calculation of penalties. In one case⁵ (currently under advisement), the appellant did put forward the argument that the agreement fell under the *de minimis* rule, under both national and European law (Art. 81 and the block exemption regulation, R. 2790/99), but the argument was based on the undertaking's share in the national market. Unlike the Expedia case (C-226/11), Art. 3 para. 2 of R. 1/2003 was not invoked, and therefore the courts did not have to examine the question of the relationship between national and EU law. In another case,⁶ the appellant did argue, *inter alia*, that the Athens Administrative Court of Appeals (AACA) had failed to give specific reasons for its finding that there was an infringement of Art. 81. The CoS dismissed this ground of appeal, on the basis that the appellant had not challenged the CC's finding that the agreement affected trade between member states, which is the only condition for applying European law in addition to national law.

The same appellant had also sought to challenge the jurisdiction of the CC, arguing that, under Art. 2 para. 1 of R. (EC) 1184/2006⁷, the European Commission has exclusive jurisdiction on the matter. This argument had been rejected by the AACA, on the grounds that:

- 1) the regulation applies only to procedures pending before the European Commission
- 2) there was no national market organisation for milk in Greece, and
- 3) the agreement was not necessary for the attainment of the objectives of Art. 33 (39) of the Treaty.

The first part of the AACA's reasoning was clearly inadequate in the way it was formulated (since it begged the question as to whether the regulation allowed for any other procedures, besides those before the European Commission), and the rest of it was not only inadequate in the absence of a detailed exposition of the workings of the CAP in the milk sector, but it also did not answer the appellant's objection on the issue of jurisdiction. By contrast, the CoS opted – by all accounts, wisely so – to limit its ruling to that issue alone, and rejected the appellant's arguments on the ground that the powers of national competition authorities to apply Art. 81(1) are not affected by Art. 2, para. 2 of R.

⁵ Application 3907/2010, *ADELFOI VEROPOULOI SA v CC*

⁶ Judgment 2365/2013, is discussed further below.

⁷ Council Regulation (EC) No 1184/2006 of 24th July, 2006, (codifying Council Regulation No 26 of 4th April, 1962, applying certain rules of competition to the production of and trade in agricultural products):

Article 1

Articles 81-86 of the Treaty and the provisions made for their implementation shall, subject to Article 2 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty, which relate to the production of, or trade in, the products listed in Annex I to the Treaty. Article 2

1. Article 81(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in Article 1 of this Regulation as form an integral part of a national market organization, or are necessary for the attainment of the objectives set out in Article 33 of the Treaty.

In particular, it shall not apply to the agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned, and any other natural or legal person that it considers should be heard, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

The Commission shall so determine, either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.

3. The publication shall state the names of the parties and the main content of the decision. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.”

(EC) 1184/2006. It is only the power to exempt an agreement from Art 81(1) (101 para. 1) of the Treaty that is reserved for the Commission alone. Interestingly, the Court reached this conclusion without reference to Art. 5 of R. 1/2003, or to the *Tele2 Polska* (C 375/09) case.

Otherwise, none of the cases raised particularly novel issues in terms of substantive law, since the appellants, by and large, limited themselves to challenging, directly or indirectly, the object/effect distinction.

In Judgment 2780/2012, in the case of *CARREFOUR – MARINOPOULOS SA v Competition Commission*, concerning a resale price maintenance agreement between the appellant, a supermarket chain, and a milk processor (MEVGAL SA), the appellant thus argued, *inter alia*, firstly, that the legality of resale price maintenance agreements should be assessed under a ‘rule of reason’. Secondly, that an infringement can only be established if an agreement can be shown to have produced effects in the relevant market and only after balancing, through a rigorous and thorough economic analysis, its pro- and anti-competitive effects, in the light of the particular circumstances of that market; and, thirdly, that the Competition Commission and the AACA disregarded evidence showing that, in practice, the appellant had not applied the retail prices suggested by the supplier.

This is all familiar ground, which provided the Court with an opportunity to reaffirm:

Firstly, that, in the case of restrictions by object, there is no need to show effects, compliance, or that the agreement has been applied at all. Indeed, the Court, taking its cue from a remark of the CFI in *Mannesmannröhren-Werk* (T-44/00, points 132-3), went even further to hold that in the case of infringements by object there may not even be a need to define the relevant market except insofar as, in its judgment, that might be considered necessary, either in order to establish whether the agreement affects the trade between member states, or for the calculation of a penalty. In view of this, there is no question of balancing the pro- and anti-competitive effects, nor does the CC need to show that the agreement results in an ‘unreasonable’ restraint of trade, instead, it is the defendant undertaking that has the burden of proving why the agreement should be exempted under paragraph 3. Significantly, the Court did not make any explicit pronouncement on the question of whether, in that respect, a distinction should be made between restrictions by object and restrictions by effect. However, since it did rule that vertical restrictions by object are not only not covered by the block exemption regulation, but, in principle, cannot even claim the benefit of an individual exemption, there is arguably an implicit ruling that, even in the case of restrictions by effect, any balancing should take place in the context of paragraph 3. Still, formally, the question remains open, and, secondly (albeit somewhat implicitly and cautiously, through the structure of its argumentation), that the same rules apply to horizontal and vertical agreements. This is an issue where the ECJ had also chosen to tread carefully: In *Activision Blizzard* (C-260/09), the ECJ, while allowing that the same principles apply to both types of agreements, it pointed out that, in contrast to horizontal settings, in vertical relationships, communications between undertakings are normal; and when urged by the Commission to apply the public distancing rule to vertical settings, that is, in essence, to reconsider the stringency, in terms of the evidentiary burden, of the tacit acquiescence test established in *Bayer* (C-2/01 P and C-3/01 P) and *Volkswagen II* (T-208/01 and C-74/04 P), the ECJ avoided deciding on the issue, on the grounds that neither the Commission nor the CFI had relied on that rule, but on documentary evidence. This road, however, was open only in part to the CoS, as the AACA, had already relied (albeit probably unnecessarily, on which more anon) on the public distancing rule and therefore, although the Court did not need to make an explicit pronouncement on the issue of whether, in substantive law, the same rules apply to horizontal and vertical agreements, the question could not be entirely by-passed in the area of evidence and proof. The solution adopted by the Court, perhaps not an entirely satisfactory one, was a two-stage analysis of both the substantive and the evidentiary aspects of para. 1: A general overview of the principles applicable to restrictions by object (which does not distinguish between horizontal and vertical agreements) is followed by a ruling that RPM, as an agreement affecting prices, is also a restriction by object. The analysis of evidentiary rules (on which, again, more anon) follows the same structure: the analysis of the Court starts with a general outline of the types of evidence from

which the existence of an agreement may be adduced; having first established that, in both horizontal and vertical settings, an agreement may also be inferred, *inter alia* from the undertaking's behaviour, or from statements addressed to it. The Court went on to rule that both the absence of a public distancing (in a horizontal setting), and, the tacit acquiescence to an invitation, the expression of a wish, or the manifestation of the intention of a continuing business partner (in a vertical setting), are such types of behaviour. The two tests, the public distancing test and the tacit acquiescence test, were thus implicitly presented as functional equivalents, differing only in the context of their application (vertical as opposed to horizontal) – a solution that comes far closer to the position of the Commission than the ECJ was prepared to go but, in the absence of an explicit pronouncement, it is still adaptable to the circumstances of future cases (particularly cases of parallel trade in pharmaceuticals), where an inference of tacit acquiescence would probably go against common sense. The actual complaint of the appellant, however, that passivity does not equal consent, was dismissed on the ground that, although the AACAs, under the particular circumstances of the case, did not err in law, in relying also 'for the sake of completeness' on the tacit acquiescence test its judgment was in fact based primarily on the interpretation of documentary evidence in the light of the circumstances.

This analysis was reaffirmed, again, in a more condensed form, in Judgments, 2007/2013 and 2365/2013, in the cases of VIVARTIA SA ('DELTA FOOD SA') and FAGE – MILK PROCESSING INDUSTRY SA v Competition Commission, the appellants. In those cases, two of the cartel members had also argued, *inter alia*, that the main object of the agreement was to coordinate their approach on monitoring compliance by milk farmers with quality control regulations, thus giving the Court the opportunity to reaffirm that if an agreement has an anti-competitive object, it is irrelevant whether it also has a legitimate one.

Given the weakness of the appellants' case in law, it is not surprising that the thrust of their arguments was directed towards questions of procedure and the evaluation of evidence. Underlying those grounds of appeal was a general complaint that the CC and the AACAs had failed to observe the appellants' rights to a defence, and the presumption of innocence, that are guaranteed by Art. of the ECHR: In the CARREFOUR case, the appellant sought to argue that the public distancing rule, as well as any recourse to the use of judicial presumptions is, in general, incompatible with the presumption of innocence, guaranteed by Art. 2, para. 2 of the Convention; and in the DELTA and FAGE cases, the appellant undertakings argued that the CC had violated their right to have their case tried by an impartial tribunal and their rights to defence, guaranteed under the 'criminal head' of Art. 6, para. 1 of the Convention.

The Nature of the Sanctions Imposed

In view of the arguments of the appellants, the first issue that the CoS had to examine was the nature of the sanctions imposed by the CC.

The response of the Court was markedly cautious. In the CARREFOUR case the Court held that 'quite independently of the question whether the sanctions for infringements of competition law should be considered as *lato sensu* criminal, in the sense of Art. 6 para. 2 of the ECHR, despite the fact that the decision is characterised *expressis verbis* as non criminal in Art. 23 para. 5 of R. 1/2003 and in Art. 15 para. 2 of R. 17', there had been no violation of the Convention, either *in abstracto* (i.e., in terms of the applicable rules of evidence), or *in concreto* (in their application by the AACAs). The ruling of the ECHR in the MENARINI case (27.9.2011, R.43509/08), although known to the Court, was politely ignored, the need to resolve a potential conflict between EU law and the Convention was bypassed, and the niceties of courtesy between independent jurisdictions have been preserved, in a manner not dissimilar in its essence to that adopted by the EU courts. Still, that formulation had left open the possibility to reconsider the issue, should the need arise. Indeed, in the DELTA and FAGE cases, in two preliminary rulings, referring the cases to an enlarged panel for a rehearing on the ground of their major importance, the Court seemed inclined to take the extra step: this time, citing

MENARINI, it asserted that ‘the case involves a charge of a ‘criminal nature’ in the sense of the Convention⁸. On the other hand, the quotation marks, which are used, as a matter of course, at least by the 2nd Section of the Court, whenever a sanction is ‘criminal’ only in the Engel sense, were preserved. The enlarged panel, however, while still citing MENARINI, reverted to hypothetical mode and, without this time making a reference to R. 1/2003 and R.17, held that even if it were to be assumed that the case was related to a charge of a ‘criminal nature’, there had been no breach of the Convention.

The Evaluation of Evidence and the Presumption of Innocence

In the CARREFOUR case, the CC had relied on three pieces of evidence for its finding that an anti-competitive agreement had been concluded between the appellant and its supplier:

- 1) an rpm clause in the text of the agreement on the terms of their business relationships, a copy of which had been forwarded to the appellant by his supplier, accompanied by a cover letter that was signed by the supplier's commercial director;
- 2) a wholesale pricelist (retrieved from the supplier), and
- 3) a representative sample of retail prices, which the undertaking had provided itself in response to the questionnaire of the CC, and which, when compared with the list of wholesale prices, confirmed that the agreement had been applied. In their submissions before the AACA, the appellant had argued that the infringement had not been proven to the ‘requisite legal standard’, because
 - 1) in the absence of a document signed by the appellant and accompanied by a list of agreed retail prices, there was no ‘positive proof’ that an agreement had been concluded, and
 - 2) in the absence of explicit consent, its silence should be interpreted as being a repudiation of the rpm clause.

These arguments were certainly sheer sophistry, since the existence of a signed document is not a condition for the existence of a contract under the Civil Code. The AACA, however, prudently avoided entering into that issue, and dismissed the appellant’s arguments on the ground that:

- 1) the absence of a signature was irrelevant, because the existence of a valid contract is not necessary, and
- 2) the appellant, having admitted that the ‘commercial terms’ of the agreement had been agreed and applied, could no longer, in the absence of a public distancing, consistently argue that the rpm clause did not also make part of the agreement.

This reasoning did not leave too many options open to the appellant, except to raise the stakes: In its appeal before the CoS, it argued, firstly, that there is no set of finite circumstances that would allow, as a matter of course, the discarding of the possibility (*éventualité*) that the agreement achieved between the parties did not include the particular offending clause. Secondly, that in the field of administrative sanctions, a recourse to judicial presumptions in general, and to the distancing rule in particular, or any drawing of adverse conclusions, that did not arise from directly proven positive behaviour but from the inaction or silence of the defendant, violates the presumption of innocence; and,

- 3) that, in view of that presumption, the CC and the AACCA had misapplied the rules of evidence, firstly, by failing to attach proper weight to exonerating oral testimony, according to which the policy of the milk processors was only to suggest the maximum recommended prices; and, secondly, by failing to conduct a thorough economic analysis, in order to examine whether the retail prices observed might allow for the possibility of drawing an inference that no agreement had been concluded.

⁸ Judgments 2447/2012, 3717/2012.

While the specific complaints of the appellant could be summarily dismissed as being inadmissible in cassation proceedings, the general argument, on the implications of the presumption of innocence for the evaluation of evidence, could not. In its response to the appellant's complaints, the Court thus set itself two tasks: firstly, to provide an overview of the relevant principles; and, secondly, to provide a framework for the direct integration of the (essentially identical in their main lines) solutions adopted by the EU courts into domestic law. In terms of structure, the analysis of the Court was divided into three distinct parts, each one of them involving several small successive steps.

The Relevance of the Evidence

The starting point of the analysis was to examine what types of evidence can be considered in order to establish the existence of an agreement. In response to the appellant's contention that only documentary evidence of a contract may be considered relevant, the Court held (providing several examples from EU case law) that, since any expression by distinct undertakings of a joint intention to conduct themselves on the market in a specific way constitutes an agreement, for the purposes of competition law, pointers to the existence of such an agreement can be adduced directly, or inferred indirectly, by any form of manifestation or documentation of that conduct, including business documents or other internal documents of an undertaking, mentions in internal documents or communications of other undertakings, communications from, to, or between undertakings, as well as actual market behaviour. Through this analysis, the elements on which the AACA had relied for its finding of an infringement were presented in a more general context as specific instances, or as examples of a general class. As a final note, it should be mentioned that there is one element that is conspicuously – and deliberately – missing from this shopping list of 'smoking guns': there is no mention of enforcement mechanisms. Indeed, in a vertical setting such mechanisms are equally compatible with the existence of an agreement, as well as with unilateral conduct; and in a horizontal setting, they may provide the evidence for the existence of a cartel, but not of membership in it, since retaliation measures can be taken equally well against renegade cartel members, or against non-joiners or competitors.

The Evaluation of the Evidence

The next question that the Court was called to examine was that of the evaluation of evidence. The starting point of the analysis was that, in the evaluation of evidence, the *juge du fond* must give full effect to the principle of the effectiveness of EU law. The principle of harmonisation, although not explicitly stated, was certainly implicit in the structure of the Court's approach. Equally implicit in the Court's analysis was the idea that, at least in the context of R. 1/2003, the principle of procedural autonomy may not distract from the uniform application of European competition law.

The Court already had a rich body of case law on the evaluation of evidence, which had been developed mainly in the context of taxation and custom and excise. With the sole exception of the concept of *faisceau d'indices*, which is present in the case law of the EU courts, but not in the case law of the CoS, the approach of both jurisdictions is remarkably similar. The task that the Court set itself was to introduce and integrate the missing concept into its own case law. The bridgehead for what was, in essence, an exercise in translation was the principle, sanctioned in almost identical terms by both the CoS and the EU Courts⁹, that the items of evidence on which the CC and the AACA rely in a decision, in order to prove the existence of an infringement, must not be assessed separately, but as a whole. There is a wealth of cases, where the CoS, deciding on an appeal from the tax authorities or the customs office, held that the lower courts, by separately examining the probative value of its individual piece of evidence, in order to decide whether a tax offence had been committed, had erred

⁹ See e.g., 48/69 ICI, point 68, T-311/94, *Kartonfabriek de Eendracht* point 201.

in law. What is more, in those cases, the court to which the case was remitted for reconsideration was not directed to examine whether a direct proof of the authority's case could be adduced from the evidence as a whole, but whether the evidence, as a whole, was sufficient to establish a judicial presumption. It was then sufficient for the Court to link the familiar concept of judicial presumptions with that of *faisceau d'indices*: the task of the *juge du fond* is to examine whether the individual pieces of evidence, when assessed as a whole, provide such a *faisceau d'indices*; it is this conclusion that allows the drawing of a presumption. The Court went on to clarify that drawing conclusions through inferences and presumptions is a multi-step process. In the first place, each individual piece of evidence can be either a direct pointer to the existence of a certain fact, or a starting point for drawing inferences or presumptions about its existence. In a further step, those facts must be assessed as a whole in order to determine whether a particular element of the infringement has been proven. Finally, it is not necessary to prove every element or circumstance of the infringement, it is sufficient that the elements or circumstances that have been proven allow, in their turn, the drawing of a judicial presumption.

This chain of presumptions, held the Court, is sufficient condition, as a matter of law, for a *conviction ferme*; and once the *juge du fond* is able to form, if necessary through judicial presumptions, such a conviction, it is incumbent upon the defendant to put forward sufficient evidence to rebut it. This burden, however, cannot be discharged by producing isolated counter-examples, allegedly incompatible with the factual basis of the CC's case, but only by undermining it in a comprehensive manner; at any rate any arguments or proofs that the defendant undertaking put forward to show that its actual behaviour was not compatible with the spirit or the content of the agreement, must be dismissed as inoperative. Further, the appellant's contention that the counter-examples that it had put forward in evidence, in order to rebut the CC's conclusion that the agreement had been put into practice, could not be rejected without a thorough and comprehensive economic analysis, were rejected by the Court, on the ground that, since the CC had sufficiently proven its case in the first place, isolated counter-examples were insufficient to undermine it. It was therefore incumbent upon the appellant to put such a comprehensive economic analysis before the court.

To round up its analysis, the Court held, further, that even if there was not enough evidence to establish a judicial presumption, it might still be sufficient to place a burden to provide an alternative convincing explanation of the facts on the undertaking. This final remark is both more general and more stringent than the 'Woodpulp' test, since it requires not merely a 'plausible', but a 'convincing' alternative explanation, but it was strictly *obiter*; a case where the Court is invited to examine precisely the extent to which CC may rely exclusively on parallel behaviour to prove an infringement, is still under advisement.

In a final step, the Court rejected the appellant's complaint that, by relying on judicial presumptions, the AACA had, in effect, reversed the burden of proof: a recourse to judicial presumptions does not lead to a reversal of the objective burden of proof; instead, it merely constitutes a rule for the appraisal of evidence that is based on general experience. However, the appraisal of evidence and the interplay between the respective burdens to adduce the proof of the parties, is prior to consideration of the objective burden of proof. For obvious reasons, this part of the analysis was a collage of almost verbatim quotes from the ECJ¹⁰.

Compatibility with ECHR

The next stage of the analysis was to examine the compatibility of proof through judicial presumptions with the presumption of innocence. The Court chose to approach the issue in a somewhat roundabout manner, by pointing out that the presumption of innocence does not preclude a recourse to

¹⁰ Technically, from J. Kokott's opinion in *C-628 P, Alliance One International*, points 170-1, with further references.

presumptions of fact or law, even in the case of offences that form part of the hard core of criminal law and that are characterised as criminal in nature by domestic legal orders; neither does it preclude the drawing of adverse inferences from the failure of the defendant to provide an explanation or response in situations where such a response should be reasonably expected. It does not even preclude a partial reversal of the burden of proof. The only restriction is that these should be kept within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence.

This part of the judgment was again a collage of almost verbatim quotes from the case law of the ECHR, followed by a long list of citations from both the ECHR and the EU courts. It was also a mere prelude to the next step: the Court went on to hold that, if that is the case in the domain of *stricto sensu* criminal law, then, *a fortiori*, there is no requirement to extend the scope of the rules, means, methods or standard of proof that is applicable to criminal trials in the domain of administrative sanctions. This was followed by an oblique questioning of the value of the classification of competition sanctions as ‘criminal’, which is implicit in its choice of ECHR citations, which included not only cases such as *Teixeira de Castro v. Portugal*¹¹, where the Strasbourg court had held that issues such as that of the admissibility of evidence are a matter for domestic law alone, but also cases where it had, in the context of disciplinary cases (which fall under the civil heading of Art. 6), made a distinction between civil and criminal standards of proof.

This was only the third time ever that the Court had made a reference to the concept of the ‘standard of proof’. The first reference was in a minority opinion in a smuggling case¹². In that case, a member of the Court had taken the view that the distinction made by the Code of Procedure before the Administrative Courts, whereby criminal convictions are binding upon the administrative courts, while criminal acquittals are not, was not compatible with the principle of equality of arms, because ‘there is no indication in law that the administrative judge shall form a view on the basis of a standard of proof lower than that applicable in criminal trials’. The second reference was in a concurrent opinion in another smuggling case¹³, where another member of the Court had taken exactly the opposite view (the other judges, in the majority, reached a similar conclusion, but without a reference to the concept). While there had been a long line of cases where the Court had consistently rejected a contention that various rules of criminal procedure, including rules of evidence, such as the inadmissibility of unsworn testimony, should apply by analogy in the context of administrative sanctions, this was the first time that a solid majority had backed the general proposition that those differences between criminal procedure and administrative law amount to a different standard of proof. In a purely domestic context, the majority of the Court would probably have resisted the idea, or at the very least questioned the necessity of introducing a concept that presupposes a comparative analysis of the modes of evidence evaluation that are used in actual practice by civil, criminal, and administrative judges. It was the European dimension of competition law that forced the Court to take the step. This dimension was further reinforced by citing, again for a first time (or second, if one counts the citation of the same cases in the previously mentioned concurrent opinion) three judgments coming from an English court¹⁴.

¹¹ 9th June, 1998, § 34, Reports 1998-IV.

¹² *Judgment 3182/2010, EVROIL SA v Minister of Public Finance.*

¹³ *Judgment 2067/2011 Grigorios Exakoustos et al v Minister of Public Finance.*

¹⁴ The cases cited were three judgments where the CAT had held that the civil standard of proof is applicable in competition law (*Napp v Director General of Fair Trading* [2002] CAT 1 *Argos Ltd & Littlewoods Ltd v. OFT* [2004], CAT, and *JJB, and Allsports v. OFT* [2004]).

Impartiality

The issue of impartiality may arise in two different situations. The first is that of a conflict of interests in the person of the decision-maker (personal bias). The second is when the same person is called to exercise mutually incompatible functions (predetermination bias). In the DELTA and the FAGE cases, the Court was invited to examine both issues. In those cases, the appellants argued that the CC had failed to respect the ‘principle of impartiality’ that is guaranteed by Art. 6 para. 1 of the ECHR and Art. 7 para. 2 of the Code of Administrative Procedure (CAP)¹⁵, on two counts:

The first complaint was that an administrative officer (the head of Unit B/Dominance and Agreements of the Implementation Division of the General Directorate for Competition) had taken part in the initial stage of the investigation of the case by issuing the initial requests for information and also processing the application of leniency of an undertaking, despite the fact that she was related (first cousin) to the President of the Board of Directors of that very undertaking; the fact that she had recused herself, once a formal sector inquiry was opened, should not be considered relevant.

The second complaint was that, since the President of the CC had ordered the investigation of the case, he should have been barred from participating in its final disposition; and, secondly, his decision that an undertaking’s application was admissible was, in essence, tantamount to an implicit finding that there was an infringement.

In view of these arguments, the first question that the Court had to decide on was whether Art. 6 of the Convention applies to the CC. The issue was less straightforward than it might appear at first glance. In a case involving a fine imposed by the Independent Authority for the Security of Telecommunications (IAST), the applicant (a mobile telecommunications company), on a *recours pour excès de pouvoir* before the CoS, had argued that, since the IAST is an administrative body and the procedure before it is not public and the CoS has reviewing powers only, it had been denied its right to have its case, which involved a ‘criminal charge’, in the sense of Art. 6 para. 1 of the ECHR, tried in ‘a fair and public hearing [...] by an independent and impartial tribunal established by law’. In that case, the Grand Chamber of the Court, in a judgment, which, in view of later developments¹⁶, including its erosion in the DELTA and FAGE cases, must now be considered an *arrêt d’espèce*, had reached the conclusion that, since the independence of members of the IAST in exercising their functions, is guaranteed by Art. 19 para. 2 and 101A of the Constitution, the Authority is an ‘independent tribunal’, in the sense of Art. 6 para. 1 of the Convention. The decision to impose a fine was quashed on the ground that the hearing before the IAST was not public¹⁷. The Court thus had no alternative but to rely explicitly on the MENARINI ruling, in order to distinguish, albeit implicitly and without mentioning or citing it¹⁸, its prior judgment. The appellants’ arguments were dismissed on the grounds that Art. 6 of the Convention does not apply to the CC, which is not a tribunal but an administrative body, while the appellant’s right to have his case tried by an independent, impartial tribunal is fully satisfied by the existence of an appeal on the case’s merit before the AACA.

¹⁵ Act 2690/1999.

¹⁶ See, e.g., *Judgment 2085/2011, GENIKI TACHYDROMIKI COURIER SCS V IAST*: The general principle applicable to collegiate administrative bodies (but not to courts!), that the composition of the body need not remain constant throughout the procedure, as long as the persons who took part only in later sessions are fully briefed, was held to be applicable to the IAST.

¹⁷ *Judgment 3319/2010 (GC), VODAFONE – PANAFON TELECOMMUNICATIONS SA v IAST*.

¹⁸ In practice, only rarely does the Court formally distinguish a prior judgment, and only if it has been cited by the minority, or if a party has explicitly put forward, as a ground for appeal, that a precedent has been disregarded. It should be noted, however, that the VODAFONE ruling had already been formally distinguished in *Judgment 4163/2012*, in the case of *NESTLE HELLAS SA v CC*, where the appellant had indeed explicitly raised the issue of disregard of precedent. In that judgment, the Court held that the VODAFONE ruling is not applicable to other independent administrative authorities operating under a different statute, or when the decision can be challenged by means of an appeal on the case’s merits.

The next step in the Court's reasoning was to examine the scope and content of the principle of impartiality in domestic law, where, long before it was confirmed by Art. 7 of the CAP, it had been recognised by the Court as an essential aspect of the *RechtStaatPrinzip*¹⁹, that is, as a principle of constitutional status, applicable not only in judicial, but also in all administrative proceedings.

With respect to the appellants' first complaint, the Court drew a distinction between participation in the decision-making process, either in an advisory or in a decision-making capacity, and in the carrying out of ancillary, procedural, or preparatory tasks, such as the collection of information, material, or other evidence, falling short of drafting an opinion or a report. In the latter case, the existence of a conflict of interests, in the person of an official carrying out such a task, is not in and of itself a sufficient ground for calling into question the impartiality either of the procedure before another body, or of its judgment.

With respect to the applicants' second complaint, the situation was more complicated. According to the settled case law of the Court, an official is disqualified from participating in the determination of an issue in two circumstances. Firstly, unless it is otherwise expressly provided by statute, he may not participate in the review of the regularity of a decision in which he has also taken part²⁰. Secondly, in a seminal judgment²¹, the Court held that, in view of the (constitutional) principle of impartiality and the right to a fair trial, guaranteed by Art. 6 para. 1 of ECHR, the official who has instituted disciplinary proceedings may not subsequently sit as a member of the disciplinary board²². On the other hand, there is also a long line of cases where the Court had held that the exercise by a public official of a specific duty that is explicitly entrusted to him by law, such as carrying out an onsite inspection, compiling an expert report, drafting an advisory opinion on the case, or acting as a rapporteur, will not give rise to a presumption of predetermination bias²³. In the end, the Court held that any action of the President of the CC that is related to the general direction of the works of the Commission, such as a decision to open an *ex officio* investigation, or a decision on the admissibility of a leniency application, amounts to no more than the discharge of a duty entrusted by law, therefore no presumption of bias could arise, all the more so since those duties did not even entail the expression of an opinion on the merits of the case.

The Rights to Defence and Access to the Record

Unlike the other issues, where the Court had reached a unanimous decision, the question of access to the record provoked a strong and protracted controversy within the Court.

In the DELTA and FAGE cases, the appellants had asked, before the CC, for unrestricted access to all documents that had been classified as 'confidential'. These documents belonged to three classes: 1)

¹⁹ See e.g., Judgments 789/1990 and 1990/1990 of the Grand Chamber.

²⁰ Although this principle has been elevated only to the status of a 'general principle of administrative law' in practice, the Court has accepted only one exception to the rule: that the members of the Supreme Council of Judicature are not disqualified from participating in the examination of, or by, the Administrative Assembly of the Supreme Court of an appeal against a decision of the Council. In Judgment 2243/2011 the Court held that the same rule applies to Government Legal Services.

²¹ Judgment 1117/2000, *Kleanthes Nikolaidis v National Technical University*.

²² Considering that *Pellegrin v. France* [GC], No. 28541/95 had only been decided a year previously, and *Vilho Eskelinen et al v Finland*, No. 63235/00, *Melek Sima Yilmaz v Turkey*, No. 37829/05, *Bayer v Germany*, No. 8453/04, *Vanjak v Croatia*, No. 29889/04, *Olujic v. Croatia*, No. 22330/05, etc., were still seven or more years down the road, that part of the judgment, cheerfully holding Art. 6 to be applicable in all cases of disciplinary proceedings without distinction, must have come as quite a surprise to Strasbourg!

²³ It should not, of course, be forgotten that, in view of the duties of the *juge rapporteur*, it would have been inconsistent for the Court to hold otherwise, since that would have put into question the fairness and impartiality of its own procedures, as well as its compatibility with the Convention.

Internal communications and memoranda of the CC, in other words, documents which are not part of the evidentiary record; 2) the names of milk farmers who had testified to the CC; this was not, in fact, material that had been relied upon by the CC in order to prove the infringement, and the information was kept confidential under the British Gypsum rule, and 3) the business secrets of other undertakings, such as the results of quality control tests on the milk produced by their suppliers and information on their internal organisation and their pricing and business policy – in other words, information that they had voluntarily passed to each other, their behaviour would have constituted in and of itself an infringement by object of competition rules! The appellants' complaint, that their rights to defense under the 'criminal heading' of the ECHR had been infringed by the CC's refusal to grant them access to these classes of documents, was duly rejected by the AACA, on the ground that the appellants had only made a blanket request to the CC, without specifying which documents were absolutely necessary for their defence. Further, they had failed to show that they had suffered any prejudice from the CC's refusal to grant them access to the particular classes of documents.

The appeals against the judgments of the AACA were initially heard by a panel of five members of the Court. Surprisingly, a majority of the panel took the view that any document listed in the Director General's report to the CC, or included in the list of documents that were a record of the case, loses *eo ipso* its confidential character vis-à-vis the defendant undertaking, irrespective of its content or usefulness, which is a matter for the defendant alone to assess, after having access to it. For that reason, it is not incumbent upon the undertaking to show prejudice due to lack of access; one member of the panel concurred in the result, on the ground that the CC should have applied the 2006 Rules of Procedure (which established a special procedure for allowing limited access to a non-confidential version of classified documents), instead of the 2001 Rules of Procedure; and one member of the panel, in a vigorous dissent, pointed out that: 1) that, in the past, the Court had already accepted that even in the sensitive area of freedom of movement, the applicant's access to confidential information on which an expulsion order is based, may be restricted subject to a full assessment of that information by the Court itself, and 2) there was well settled case law of the Court that a complaint of procedural impropriety must be accompanied by a showing of prejudice.

In view of the importance of the issue, the case was referred for rehearing to an enlarged panel. This time, the Court unanimously confirmed that the appellant must show that he had suffered prejudice because of his lack of access to the specific documents. In other words, he must show that the documents were potentially useful for his defence. However, it then went on to hold that the rules of procedure before the administrative courts, as they stood at the time, contained no provision restricting the applicants' right of access to the judicial record of the case, and the appellants did not allege that these documents had not been part of the record that had been communicated to the AACA. The appellants' complaints were rejected on the narrow ground that, even though there was no demonstration that they had been denied access to these documents at the judicial stage, and it could therefore be presumed that they were in a position to assess whether these documents contained either incriminating evidence that had been relied upon by the CC, or exonerating evidence that they themselves could have relied upon, they had failed to plead before the AACA that they had suffered prejudice through lack of access at the administrative stage. One member of the panel dissented, on the equally narrow ground that there was no positive evidence that the appellants had had access to these documents at the judicial stage. The issue was thus provisionally closed in a sort of anticlimax, which, apart from sanctioning the principle that prejudice must be shown, provides rather limited guidance for the future.

Conclusions

Even before it reached the courts, the milk cartel investigation was important, both for the legal issues raised and for their non-legal context, which had led to the necessary and successful 2009 reform of the CC (Act 3784/2009) and the subsequent modernisation of competition procedure (Act 3959/2011).

The cases themselves were important because the breadth of the appellants' arguments gave the Court the opportunity to provide a general overview and a concise restatement of the rules on anticompetitive agreements, evidence, and due process. In that respect, its attitude was at the same time both outward and inward looking, although always mindful of its responsibility as part of a network of European courts, to take a strong and clear position, at least whenever a majority inside the court was equally clear and robust on topics such as the gravity of vertical infringements, or the implications of the ECHR, which have been the object of long and intense discussion at the European level. Nevertheless, the Court's clear priority was, firstly, to provide clear and operationalisable guidance to the lower courts and the CC, and, secondly (although probably in the reverse order), to ensure consistency and to guide the development of its own case law across various areas of administrative law. Whether that goal has been achieved only the outcome of pending or future cases will tell.

2.4. Elena Diana Ungureanu (Pitesti Court of Appeal, Romania), *S.C. Alpiq Romindustries s.r.l. v. Romanian Competition Authority*

- **Name of the Court of First Instance: Court of Appeal, Bucharest**
- **Name of the Court of Last Instance: High Court of Cassation and Justice**
- **Case reference number No. 6369/2/2012;**
- **Date of the judgment: Decision No.7026, issued on 26th November, 2012**

Facts

By Order of the President of the Competition Council. 297/23.03.2012, an investigation was initiated on the possible violation of Art. Article 5. 1 of Competition Law No. 21/1996, competitive market segment production and sale of electricity and the electricity supply market in Romania.

Two of the companies active in those markets are Alpiq and Romindustries Ltd, companies suspected of having participated in a cartel / concerted practices.

Based on Order No. 307/26.03.2012, on 27.03.2012 unannounced inspections were carried out at the premises of the claimant, Alpiq (former name: Buzmann Industries). During the investigations, the principle of legal privilege was invoked by Alpiq in respect of a document (No. 44) in order to safeguard the communication between the company and attorney.

In accordance with procedures prescribed by Competition Law, the document that it was claimed would benefit from legal protection was submitted in a sealed envelope and then, taking into consideration the explanations written and requested, the President of the Competition Council issued Decision No. 39/2012, rejecting the protected nature of the documents under seal.

Pursuant to Art. 36 para. 11 of the Competition Act, Decision No. 39/18.07.2012 was attacked, the claimant Alpiq seeking annulment of the decision.

In support of the action, the claimant essentially indicated the following:

Alpiq Romindustries believes that the Competition Council's decision is unlawful and groundless, as the document is a confidential communication with external lawyers, and the confidential document falls within the scope of legal privilege.

The defendant Competition Council answered that the action should be dismissed as unfounded. The defendant raised the following:

The contested decision was made in full compliance with substantive and procedural provisions under the Competition Act. Unexpected correspondence sealed during the investigation could not be regarded as meeting the requirements to benefit from the legal protection provided by Art. 36 para. 8 of the Competition Act. In essence, the defendant considered that the investigation of the competition authority does not cover the rights and obligations of the parties to a contract that are stipulated therein, on which there are negotiations / renegotiations, but, naturally, the anti-competitive nature of a business relationship between these companies is possible.

The Competition Council asked the company to provide additional information that might lead to a solid conclusion on the content of the correspondence and the extent to which it might enjoy the protected nature that is referred to in Art. 36 para. 8 of the Competition Act.

Subsequently, the defendant issued Decision no. 39/18.07.2012, challenged in litigation, dismissing the protected nature of the document in question, given that Alpiq ha failed to prove the fulfillment of

the two conditions cumulatively referred to in Art. 36 para. 8 of the Competition Act, namely: that the correspondence was exchanged between a firm and its lawyers; that the correspondence is carried in order to exercise Alpiq's right to a defence in connection with the investigation by the Competition Council.

Analysis of the Legality of the Contested Administrative Act

Previously, the Court had noted that the analysis should be carried out on the following grounds: firstly, that of clarifying the limits of the rights to a defence, in the light of the specific provisions of the Competition Act and, secondly, that of clarifying the specific nature of the disputed confidential documents' content.

The Right of Defence

General considerations regarding the relationship of Art. 36 para. 8 of Law no. 21/1996 (Competition Act) and Art. 35 of Law no. 51/1995 (The Law of the Organisation of Lawyers)

Regarding the right of defence, including the principle of confidentiality in light of competition law, Article 36 para. 8-12 of Law. 21/1996, reads as follows:

(8) Communication between the undertaking or association of undertakings under investigation and the attorney thereof, carried out during and for the sole purpose of defending the undertaking, i.e., after commencing the administrative proceedings based on this law or subsequent to commencing the administrative proceedings, provided that this communication pertains to the scope of the proceedings, may not be seized or used as evidence, during the proceedings carried out by the Competition Council. Preparatory documents drawn-up by the undertaking or association of undertakings under investigation for the sole purpose of defence may not be seized or used as proof.

(9) Whenever undertakings fail to prove the protected character of the communication, according to par. (8), competition inspectors carrying out the inspection can seal and seize the documents in question, in two copies.

(10) The President of the Competition Council will make a decision, on an emergency basis, based on the proof and arguments collected. Should the President of the Competition Council make the decision to reject the protected character of the communication, the document may be unsealed solely after the expiry of the deadline within which the decision can be challenged, according to provisions in par. (11), or should the decision be challenged, after the court ruling becomes final and irrevocable.

(11) The decision of the President of the Competition Council as regards the protected character of the communication can be challenged in an administrative proceeding before the Bucharest Court of Appeal within 15 days after notification, with an exemption from Law 554/2004, and further amendments and completions. The decision of the Court of Appeal is under recourse, which is declared 5 days after the notification. Courts will solve the case in emergency and as a priority.

(12) Inspection power scanning be used in compliance with the regulations on the organisation, functioning and procedure of the Competition Council.

According to Art. 36 para. 9 of the Competition Act, the Council's inspection powers are thus to explore any area held by the company inspected, to examine any documents, records, financial accounts, regardless of their support, and to apply seals in situations where it is necessary.

Inspection power limits, with the effect that: an empowering inspection is made solely for the purpose of investigating violations of the Competition Act; inspection powers can be exercised only on facts and documents relating to the object and purpose of the inspection, as described in the order of inspection issued in regard to the order of the investigation; the right to raise and then use communications between lawyer and the firm inspected is limited when those communications are

made within, and solely to exercise their right to a defence in connection with the Competition Council's subject of investigation.

Article 35 of Law no. 51/1995 reads as follows:

- (1) To ensure the professional secrecy of professional papers and proceedings, the attorney or his office shall be inviolable. Raiding the lawyer, his home or his office, the raising of documents and goods, can be done only by the prosecutor, under a warrant issued under the law.
- (2) The lawyer and telephone calls shall not be intercepted and recorded by any technical means, and the professional correspondence opened only under the conditions and procedure provided by law.

In respect of Article 10 para. (4) of the Statute of the legal profession, also invoked by the claimant, the Court stated that it must first be interpreted as circumstantiating principles and rights enshrined in the Law no. 51/1995 and, secondly, it cannot be considered to have a higher legal force than a law, such as competition law.

In addition, the establishment of the principles of Art. 35, mentioned above, has 'to ensure the secrecy' that a lawyer must keep. Consequently, this is the distinction between the concepts of professional secrecy in Law 51/1995 and the Competition Act's protected communication.

The secrecy is a requirement, and it is the responsibility of the lawyer to preserve the confidentiality of discussions with customers and third parties. As a corollary, in criminal proceedings, this principle must be respected by third parties, as distinguished in Art. 35 of Law no. 51/1995.

The Court noted that the concept of professional secrecy in Law. 51/1995 *tale quale* cannot be applied to competition, as the investigation into the incident falls under the special provisions of Law no. 21/1996, and assessment of the extent to which the document is or is not protected must be made through the legal provisions.

The concept of legal protection that is stipulated in Art. 36 para. 8 of the Competition Law, and which is conferred on attorney-client communication, is not identified by the classification as being 'confidential', of information / documents.

For lawyers, confidentiality covers any communication with the customer, not just with those who enjoy the legal protection afforded by the law of competition, with the result that the lawyer has an obligation not to disclose such information (in this respect, the provisions of Art. 46 paragraph 2 of Law No. 51/1995).

In the context of investigations into anti-competitive acts, the concept of 'information' covers facts that would cause damage to a business. For this reason, the Competition Council has an obligation to ensure the confidentiality of such information (trade secrets), without, however, businesses being able to rely on their confidential nature as a basis for limiting his/her right to obtain such information and to use samples.

According to Art. 36 para. 8 of Law No. 21/1996, in order to be protected, communications must be made under and for the sole purpose of exercising the rights to a defence; must be prepared on or before the opening of administrative proceedings, but not necessarily be related to the procedure. The consequences of these conditions are the limited powers of inspection conferred by Art. 36 para. 1: there is no right to raise such communications and this makes it impossible to use them as evidence in the Competition proceedings.

The Confidential Nature of the Document in Question

The claimant claims that the document in question, sealed, Minutes no. CC/DIE/794/27.03.2012, is an email sent by Mr. Octavian Caragea - Executive Director SC Buzmann SRL (the current Alpiq Romindustries) - by Mr. Dragos Nicholas, CEO. It also shows that the e-mail contains an attachment,

representing an early draft letter prepared by Hidroelectrica Boștină SCPA and ASOC are played mainly with relevant legal arguments in a defence's position on a possible modification of the contractual relationship of Buzmann Industries with Hidroelectrica (address Alpiq no. RG-7146/29.05.2012).

Moreover, the advice was given under a legal contract in 2006 (possibly on or around 12th May, 2006), with the purpose of advising and assisting Alpiq.

The trigger for the application for legal aid was the 'potential change in the contractual relationship with Hidroelectrica'. It is evident, therefore, that Buzmann (Alpiq)'s need to obtain legal advice does not have its origin in consideration of the exercise of a right to a defence against a possible (imminent) sanction, but the need to protect its commercial interests as being effectively involved in the contractual relationship with Hidroelectrica.

Firstly, none of the arguments raised by the claimant are to motivate the existence, in its correspondence with his lawyers, of a request / giving legal advice, which Alpiq needs in order to exercise its right to a defence.

Secondly, since the letter was drafted before the opening of the investigations by the Competition Council, the Court assessed whether the condition laid down in Art. 36 para. 8 of the Law was met (i.e. that the document was relevant for the investigations).

From the description of the facts that triggered the investigation and with respect to its object, as is apparent from Order No. 297/23.03.2012, on the one hand, and, on the other hand, the research for the content of the disputed confidential documents (especially the last three lines of the attached document (E-mail) that is in question), it does not appear that requests / provision of legal advice to Alpiq, by its lawyers, were related to the procedure.

The investigation of the competition authority thus does not cover the rights and obligations of the contracting parties stipulated therein and in respect of which there are negotiations / renegotiations, but the possible anti-competitive nature of the business relationship between these companies. The terms of this relationship relate to both the written clauses in contracts, and those resulting from the actual conduct of the parties.

So, the defendant correctly concluded, in the contested decision, that the applicant's arguments were not likely to show that this correspondence was conducted in order to exercise the right to a defence in the administrative proceedings of the Competition Council.

For all these reasons, the Court found that Decision No. 39/18.07.2012, issued by the Competition Council, was legal and the action was dismissed.

Comment

The judgment is the first Romanian competition case that deals with the legal privilege.

In *AM & S Europe v Commission*, the Court, taking account of the common criteria and similar circumstances existing at the time in the national laws of the Member States, held, in paragraph 21 of that judgment, that the confidentiality of written communications between lawyers and clients should be protected at Community level. However, the Court stated that that protection was subject to two cumulative conditions.

In that connection, the Court stated, first, that the exchange with the lawyer must be connected to 'the client's rights to a defence' and, second, that the exchange must emanate from 'independent lawyers', that is to say, 'lawyers who are not bound to the client by a relationship of employment'.

As to the second condition, the Court observed, in paragraph 24 of the judgment in *AM & S Europe v Commission*, that the requirement as to the position and status as an independent lawyer,

which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role in collaborating in the administration of justice and in being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline, which are laid down and enforced in the general interest.

The Court repeated those findings in paragraph 27 of that judgment, according to which written communications which may be protected by legal professional privilege must be exchanged with 'an independent lawyer, that is to say one who is not bound to his client by a relationship of employment'.

The principle was recalled in the case *Akzo Nobel*: 'It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

The concept of the independence of lawyers is determined not only positively, that is, by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.'

2.5. Patrizia Puccini (Venice Court of Appeal, Italy), *Pasquale Savarese v. Lloyd Adriatico S.p.A.*

Judgment of the Italian Supreme Court No. 00104230321

Introduction

An insured person who files an action for damages, pursuant to Art. 33, second paragraph, of the law of the 10th October, 1990, No. 287 (the so-called anti-trust law), against the insurance undertaking sanctioned by the Antitrust Authority for participating in an anti-competitive agreement, bears the burden of submitting the contracted insurance policy and the decision ascertaining the existence of the anti-competitive cartel in the administrative PROCEEDING, so that these circumstances are sufficient to establish the presumption of undue premium increase as a result of collusive behaviour, and of the relative extent of the increase.

In fact, in the computation of the damage suffered by most insured people due to the antitrust offence, determined on the basis of serious, precise and consistent presumptions, an essential component is represented by the damage suffered by the insured individual. It should therefore be accepted that this damage, although conceptually distinguishable on a logical level, is not distinguishable on the factual level and, accordingly, does not require, in order to be demonstrated, the operation of a further presumption.

Facts

On the 28th July, 2000 the Competition Authority for the market (henceforth, the Authority) sanctioned a large number of insurance companies, including the company Lloyd Adriatico SpA (now Allianz SpA), because they had entered into an agreement in the form of a concerted practice, consisting of the systematic exchange of sensitive business information between competitors, with reference to the policies of RCA (insurance for civil liability)

The authority noted that this practice caused a significant increase in premiums during the period affected by the unlawful conduct (years 1994-2000), both in the level of premiums in force in Italy until 1994, before the liberalisation of tariffs, and to the average premiums on the European market, lower by about 20% compared to those premiums charged in Italy.

Pasquale Savarese sued Lloyd Adriatic before the Naples Court of Appeal, alleging that it had entered into a contract of insurance for RCA and had paid the premium for the period 10th December, 1990-10th December, 2000, and they asked for compensation for the damages suffered under the law of October 10th, 1990, No. 287 (Art. 33) for breach of the rules for the protection of competition by the effect of the cartel that was sanctioned by the Authority.

Judicial Proceedings

The Court of Appeal granted the request and ordered Lloyd to compensate for damages amounting to €500.00, plus legal interest. In doing so, it invoked the principles established by the Supreme Court (section a. n. 2207/2005) on the reach of Law No. 287/1990, which aims not only to regulate the relationship between the companies, i.e., to ensure respect for the free exercise of competition, but also aims to protect consumers, which are therefore entitled to apply for a declaration of the invalidity of a restrictive cartel and for compensation for the damage suffered through the stipulation of the contracts ‘downstream’ that constitute the outlet and its implementation. Such damage ought to be such as to

account for the removal of the effects of the surcharge that was unconsciously accepted by them, having deprived consumers of the opportunity to enjoy the benefits that are naturally produced by the rules of free competition.

It also ruled that the certainty of damages to most of the insured is a fact from which the damage for each insured can be inferred, unless the insurer manages to provide evidence - in this case, not provided - to have granted differential and favourable treatment to that particular customer if compared with the treatment practiced for the other insured customers.

The Lloyd Company appealed to the Supreme Court against that judgment, alleging infringement of Article. 2043 cc and asserting that, in order to award compensation, the undertaking which was part of an anti-competitive agreement would be required to present proof of the distorting effects of the market (the damage alleged by the final consumer) that could not be equated with the mere existence of the cartel, given that, in this case, the cartel consisted purely in the 'exchange of information' between the insurance companies and not in a 'price-fixing cartel'.

The question was, in the words of the appellant, that a presumption (on the damage suffered by the individual insured) cannot be inferred from another presumption (that concerning the generalised price increase that is assumed as a result of the exchange of information, constituting the antitrust offence) and, more particularly, that the presumptions would still lack qualities of precision, concordance, gravity.

Furthermore the appellant observes that the increase in policy premiums is due to different causes rather than unlawful competitive behavior, and that are external to the intention of insurance companies - that had experienced a significant increase in costs (the scams against themselves; the increase in litigation; the rise of compensation due to the new criteria for quantifying biological damage, the incidence of taxation, the adjustment of claims reserves imposed in the Community, the level of inflation in Italy, strong liabilities that marked the economic situation of insurance companies on the eve of privatisation in 1994).

The Court stated that the pleas were unfounded because if it is true that the Authority found only an agreement suitable for the distortion of normal competition, and not a cartel agreement on the level of premiums, there is no doubt that the detection of the abnormal increase in premiums relating to RCA policies, during the period of the cartel, was, on the one hand, an assumption of the illegality of that behaviour and, on the other hand, a reliable determination of its detrimental effect on insurance service users.

The Supreme Court also held that insured people who act for damages, pursuant to Art.33 of Law No. 287 of 1990, have the right to use the presumption that the award was improperly increased as a result of collusive behaviour, and that the extent of the increase (and, therefore, the extent of the damage suffered) was not less than 20 per cent. The Supreme Court clarified that the defendant's insurance company should be allowed to provide evidence contrary to the above-mentioned presumption of responsibility with regard to both the existence of a causal link between the unlawful act and the damage, and the extent of the injury itself. However, this evidence cannot be based on relevant circumstances regarding the general situation of the insurance market, but must relate to situations and specific behaviours of the insurance company in question, the individual insured and the individual policy (including a comparison of the rates charged by the insurance company and those applied by other companies who were not participating in the illegal cartel).

Comment

The White Paper suggests that where proof of fault is required in a claim for damages, the infringer is presumed to have acted with fault unless he can prove that the infringement was due to a genuinely excusable error.

Judgment of the Court of Appeal of Lithuania on 26th May, 2006¹

Facts

The case of private enforcement was started by the claimant CJSC Šiaulių tara, a distributor of Lithuanian alcoholic beverages in the territory of Lithuania, against the JSC Stumbras - one of the biggest producers of strong alcoholic drinks in Lithuania.

During 2000, the defendant was selling its products to 37 wholesalers, including the claimant, and 2 retailers. By the end of 2001, the defendant was already selling its product to only 9 wholesalers and 2 retailers, the vast majority of its production being sold to 5 companies. The defendant also had contracts for marketing, advertising and similar services with some of the wholesalers. Payments for the same amounts of the product realised, paid by the defendant to different wholesalers under those contracts (marketing payments) differed significantly, despite the fact that the other conditions were similar. During 2001, the defendant paid over 3 million Litas, the most significant amounts being paid to the same 5 companies.

In 2002, the National Competition Authority of Lithuania fined JSC Stumbras for the violation of Paras. 1 and 3 of Article 9 of the Law on Competition of the Republic of Lithuania.² The National Competition Authority ruled that, by their very nature, the payments under the marketing contracts were hidden discounts on production. The actions of the defendant when applying different payments to the wholesalers for the same services, distorted competition, as some retailers, due to the discounts granted, thus had the possibility to sell their products at lower prices than others. The ruling of the National Competition Authority was not appealed against in the administrative courts.

The claimant, who was not granted any payments from the defendant, applied to the civil court claiming 2,864,809 Litas of damages, calculated as 878,336,45 Litas of lost marketing payments (based on factual purchases of production from the defendant and applying the highest payment rate that the defendant had applied to the wholesalers) and 1,986,472,55 Litas of damages caused by the loss of market (loss of profit and lost marketing payments on the potential purchases of products from the defendant).

The defendant contested the claim, arguing that:

- 1) the ruling of the National Competition Authority was defective due to the incorrect definition of the relevant market, the inaccurate establishment of the dominant position of the defendant and the unfair evaluation of the actions of the defendant as an abuse of its dominant position;
- 2) the calculation of damages was ungrounded, as the claimant was not able to provide marketing services at the same level as other wholesalers, and was not entitled to payment for such services. The loss of market was caused by the actions of the claimant itself, but not by the actions of the defendant.

¹ The case was not appealed to the Supreme Court of Lithuania.

² Prohibition of abuse of a dominant position, in particular - the direct or indirect imposition of unfair prices or other purchase or selling conditions, and the application of dissimilar (discriminatory) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage.

The Ruling of the First Instance Court

The main issues dealt with by the Courts concerned the legal significance of the uncontested ruling of the National Competition Authority when judging the illegal actions of the defendant as an essential condition of civil liability, and the calculation of damages caused by the anti-competitive behaviour of the defendant.

The Court of First Instance, when hearing the case, appointed a court expert to provide an opinion on the calculation of damages. The expert gave the conclusion that although calculation of damages that took as its basis the highest payment rate that the defendant had applied to the wholesalers was legally correct (as the distortion of competition could only be eliminated by applying the same conditions to all the wholesalers), it was ungrounded from the economic point of view, as it is unclear whether the defendant was able to apply the same (highest) rate to all of them, and the basis of the application of different payment rates remained unclear. In addition, the claimant was not able to provide marketing services at the same level as the wholesaler that had received the highest payment rates. In the opinion of the expert, it was economically justifiable to calculate damages on the basis of the factual purchases of production from the defendant by applying the average payment rate that the defendant had applied to the wholesalers, and deducting the expenditure.

The Court of First Instance partially satisfied the claim. The ruling of the National Competition Authority was regarded by the court as *prima facie* evidence³ of the illegal actions of the defendant. The court also ruled, disregarding the expert's opinion, that calculation of damages that took as a basis the highest payment rate that the defendant had applied to the wholesalers, is justifiable, as it is the only way to rectify the violation of competition rules. Although finding the claim well grounded, the Court reduced the amount of damages to 500,000 Litass,⁴ having regard to the fact that the defendant had already been fined 100,000 Litass for the distortion of competition, the ultimate amount of the claim was based on predicted income, and market prognosis is never 100 per cent fulfilled.

The judgment was appealed by both parties.

The Ruling of the Court Of Appeal

The Court of Appeal of Lithuania accepted the evaluation of the First Instance Court regarding the legal significance of the ruling of the National Competition Authority and concluded, without going into many details of the relevant arguments of the appeal, that the defendant had not provided sufficient evidence that the facts established by the National Competition Authority were incorrect.

The Court also noted that the Law on Competition does not provide any special rules for the calculation of damages in competition cases, so the general rules of the Civil Code for damage calculation should be applied. However, due to the peculiarities of the case, special knowledge for the calculation of damages is essential. In the opinion of the Court, the Court of First Instance unreasonably disregarded the expert's opinion,⁵ and also disregarded that the solution on the calculation of damages, which had been proposed by the expert, was correct.

The Court found that the claim for 1,986,472,55 Litass in damages caused by the loss of market was ungrounded, basing this conclusion on the fact that, following the general rules of civil liability, loss of income cannot be calculated on the basis of the lost income itself.

³ According to Article 197 of the CPC, facts contained in *prima facie* evidence (official written evidence) are presumed to be true, until clearly disproven by other evidence, with the exception of witness testimony.

⁴ The Civil Code of Lithuania gives some discretion to the Court when deciding on the amount of damages.

⁵ According to Article 218 of the CPC, the expert's opinion is not binding on the court, but disregard of this opinion must be sufficiently motivated. Due to its economic nature, judges are quite unwilling to disregard the experts' opinions in practice.

Comment

Rating the ruling of the National Competition Authority as *prima facie* evidence of illegal actions means that, in general, civil courts are not bound by the findings of the National Competition Authority, whose ruling can be contested before the Civil Court in actions for damages, without even following the procedure of challenging the ruling before the Administrative Courts. However, in reality, the possibilities of challenging the relevant findings are very limited. In judgments on the amount of damages, courts tend to refer to court experts' opinions, which, under national civil procedural rules, have more significance than other evidence provided.

2.7. Yulia Todorova (Sofia Regional Court, Bulgaria), *X Ltd. V. Z Ltd.*

Judgment No. 171 of 11th February, 2013, of the Bulgarian Supreme Court of Cassation, Commercial College, on Commercial Case No. 64/2012.

Facts

The subject of appeal before the Supreme Court of Cassation is Judgment No. 230 of 27th October, 2011, delivered by the Varna Appellate Court, Commercial Division, whereby the court confirmed Judgment No. 4 of 25th March, 2011, of the Razgrad District Court on the Commercial Case No. 35/2009. The latter judgment grants claims for BGN 230,091.19 laid by X Ltd. against Z Ltd., together with the legal interest thereon as from the date of the lodging of the claim – indemnity for damage caused by the actions of the defendant, sanctioned as an infringement under Art. 30 of the Protection of Competition Act /repealed/.

The infringement is ascertained by Resolution No. 866 of 9th October, 2007, on file No. K.217/2007 of the Commission for the Protection of Competition, confirmed by a three-member bench and a five-member bench of the Supreme Administrative Court and, additionally, for the sum of BGN 90,124.10, being the legal interest on the principal as indemnity for delay in payment.

The appellant claims that the Judgment of the Varna Appellate Court was delivered in conflict with Art. 104 of the Protection of Competition Act, repealed, in relation to Art. 30 of the said Act as regards the elements of the factual basis of the tort/delict to be proven in the specific hypothesis of alleged damage caused by infringement with qualification under Art.30 of the Protection of Competition Act /repealed/, which was effective at the time of damage. The Judgment of the Varna Appellate Court is also allegedly in conflict with the Underground Natural Resources Act /Art. 29/ and the Concessions Act /Art. 4, para. 2/ in substantiating the legitimacy of the plaintiff as the holder of the concession rights for the extraction of rock masses, in view of depriving the plaintiff of the opportunity to exercise the said right and the earning of revenue from this business, which is the cause of the action of the tort/delict claim.

By virtue of Ruling No. 512 of 4th July, 2012, in the hypothesis of Art. 280, item 1 of the Civil Procedure Code, the appeal was allowed on the matter of whether the effect of the resolution ascertaining the infringement of the Protection of Competition Act, taken by the Commission for Protection of Competition and confirmed by the judgment of the Supreme Administrative Court, the said effect being binding on the Civil Court pursuant to Art. 104, para. 4 of the Protection of Competition Act, in regard to claims for damages that are claimed in causality, with actions consisting of an infringement of the Protection of Competition Act, the said claim being lodged on the grounds of tort/delict in relation to Art. 104, para. 3 in relation to item 1 of the Protection of Competition Act, releases the plaintiff from the burden of proving the elements from the factual basis of the tort/delict out of guilt-infringement, damage and of causality between infringement and damage.

The plaintiff has referred expressly to the infringement ascertained in the proceedings under the Protection of Competition Act and has claimed damages corresponding to lost profits /not net profit, but a price without VAT received on purchase and sale transactions/ given that the defendant has disposed with rock masses and crushed stone fractions extracted from the plaintiff and located in the quarry, which the plaintiff claims he was forced to leave after 1st July, 2007, given the behaviour of the defendant.

The Ruling of the Supreme Court

The resolution of the Commission for the Protection of Competition holds that by its actions involving unlawful extraction and sale of resources from quarry 'T', for which the defendant had no concession rights after the termination of the validity of the agreement for the purchase and sale of rock mass with the plaintiff, made on 11th June, 2003, in addition to violating the Underground Natural Resources Act, the defendant has further violated the Protection of Competition Act. The latter violation consists in the fact that, as a consequence of the bypassing of legally mandated requirements for the exercise of concession rights by omitting to pay concession remuneration, and to undertake obligations in connection with the exercise of concession rights, the defendant has gained unfair advantage over other competitors in the same geographical /North-eastern Bulgaria/ and product /crushed stone mass/ market. The Commission for the Protection of Competition has held that this unfair advantage is in conflict with the *bona fide* commercial practice within the meaning of Para. 1, item 6 of the Additional Provisions of the Protection of Competition Act /repealed/ and amounts to violation, according to the general definition of unfair competition - Art. 30 of the Protection of Competition Act /repealed/. The provision prohibits every action or inaction in conducting business, which is in conflict with the *bona fide* commercial practice, and which impairs, or may impair, the interests of competitors, or relations between them. The Commission held that X Ltd. was directly affected by the violation of Z Ltd., since X Ltd. was prevented from conducting normal business in quarry 'T', whereby, in essence, X Ltd. was pushed out of the respective geographical and product market. In its Judgment No. 8693 of 14th July, 2008, on Administrative Case No. 11045/2007, a three-member bench of the Supreme Administrative Court confirmed the resolution ascertaining the infringement by Z Ltd., qualified pursuant to Art. 30 of the Protection of Competition Act /repealed/, giving identical motives and stating as the infringement precisely the wrongfully obtained unfair advantage over the other competitors by the illegal extraction and sale of resources from quarry 'T' without the paying of concession remuneration by the defendant. The Court held that by its actions that were aimed to push out its competitor, X Ltd. from this market segment, Z Ltd. deformed the competition environment. A five-member bench of the Supreme Administrative Court confirmed the Judgment of the three-member bench of the Supreme Administrative Court by Judgment No. 2189 of 17th February, 2009, on Administrative Case No. 11800/2008. The Supreme Administrative Court held that the behaviour of the defendant in the operation of the quarry, aiming to wrongfully obtain unfair advantage at the expense of the plaintiff's competitor company, including the actions of duress on the latter to continue their use of the quarry and to push out the plaintiff from the respective market, should be qualified as a violation of *bona fide* commercial practice, given the obtaining of an unfair advantage and having, as a consequence, the deformation of the competition environment.

In conclusion, the Supreme Court of Cassation holds as follows:

Pursuant to Art. 104, para. 1 and para. 3 of the Protection of Competition Act, for damage caused as a result of infringements of this Act, the person at fault owes an indemnity and claims for indemnity are lodged under the procedure set forth in the Civil Procedure Code. Pursuant to Art. 104, para. 4, proposition one of the Protection of Competition Act, the judgment of the Supreme Administrative Court, which has taken effect and which confirms the resolution of the Commission ascertaining infringement of the Act, has binding force on the Civil Court regarding whether the resolution of the Commission is valid and lawful. The substantive lawfulness of the instrument consists in its consistency with the prerequisites contemplated in the applicable law and in the scope of its determination, which is the subject matter of administrative proceedings. Pursuant to Art. 104, para. 4, proposition one of the Protection of Competition Act, the mandatory effect of an administrative instrument confirmed by a judgment of the Supreme Administrative Court extends to its substantive lawfulness in the 'ascertainment of the infringement'. The Supreme Court of Cassation further elaborates that the mandatory character of the resolution of the Commission for the Protection of Competition, as regards its substantive lawfulness, extends in addition to the framework of its scope – the ascertainment of specific behavior that is qualified as infringement within the meaning of the

Protection of Competition Act, and also to all affected physical persons and legal entities, regardless of whether the infringement is directly targeted at them /Art. 104, para.2 of the Protection of Competition Act/, respectively, regardless of their participation in the administrative proceedings, where the Court judgment confirms the resolution of the Commission.

According to the Supreme Court of Cassation, the resolution of the Commission for the Protection of Competition, whereby the Court ascertains the infringement of Art. 104, para. 4, proposition one of the Protection of Competition Act, which is confirmed by the judgment of the Supreme Administrative Court in the event of a tort/delict claim lodged under the procedure set forth in the Civil Procedure Code in causality with the ascertained infringement, binds the Civil Court solely in regard to the ascertainment of the infringement by its contents, corresponding to the qualification given by the Commission for Protection of Competition under the Protection of Competition Act. In accordance with the general court proceedings rules, the remaining elements of the factual basis of tort/delict are subject to proof before the Civil Court, i.e., damage, causality between the infringement of the Protection of Competition Act, damage and its scope, causality between the damage and unlawful behaviour.

The Commission for the Protection of Competition held in the course of the proceedings thereat, being administrative proceedings, that the extraction and marketing of product is in conflict with the legal requirements for concessionary rights proceedings that are held from the omitted payment of concession remuneration and expenses and obligations that are characteristic of the exercise of concession rights, the Commission has held that the defendant company has gained unfair advantage in the respective geographical and product market, including ousting a market competitor, i.e., X Ltd. Such behaviour is in conflict with *bona fide* commercial practice and leads to the deformation of the respective market environment. In conclusion, the Supreme Court of Cassation holds that there is no causality between the infringement ascertained by the Commission and the claimed damages. The Supreme Court of Cassation thus concludes that the plaintiff is not entitled to indemnity on the grounds of infringement of the Protection of Competition Act since the causality between the property damage and unlawful anti-competition behaviour has not been proven. The Supreme Court of Cassation reverses judgment No. 230, delivered on 27th October, 2011, on Commercial Case No. 367/11 of the Varna Appellate Court, Commercial Division, in the part where it was confirmed by Judgment No. 4 of 25th March, 2011, of Razgrad District Court on Commercial Case No. 35/2009 in the part appealed before the Appellate Court.

Comment

The case is quite significant for Bulgarian private enforcement of competition rules, because the decision of the Supreme Court is based on Art. 290 of the Code of Civil Procedure. The decision is obligatory for all national courts which have jurisdiction, that the Decision of the Commission for the Protection of Competition binds the civil court solely in regard to the ascertainment of the infringements. The other remaining elements of the factual basis – damage, causality between the infringement of the competition law and the damage, must be proven before the Civil Court, when the company claims damages.

3. Cartels and Anti-Competitive Agreements

3.1. Jana Zemkova (Supreme Court, Slovakia), *Slovenská Sporiteľňa v. Slovakian Competition Authority*

- Judgment of the Supreme Court No 3Sžh/4/2010

-Case C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* (2013) n.y.r. ECR

Facts

By a decision of 9th June, 2009, the Protimonopolný úrad Slovenskej republiky, odbor dohľad obmedzujúcich súťaž (the 'Restrictive Agreements' Division of the Competition Authority of the Slovak Republic; 'the Division'), a first-level authority with competence in the protection of competition, found that three major banks with their principal places of business in Bratislava (Slovakia) – namely Slovenská sporiteľňa a.s., Československá obchodná banka a.s. and Všeobecná úverová banka a.s. – had infringed Article 81 EC (now Article 101 TFEU) and the corresponding provision of Law No 136/2001 by entering into an agreement: i) to terminate contracts relating to the current accounts of Akcenta CZ a.s. ('Akcenta'), a company whose principal place of business is in Prague (Czech Republic), and (ii) to refrain from concluding new contracts with Akcenta.

The Division considered that Akcenta, which is a non-bank financial institution providing services comprising cashless foreign exchange transactions, needed to have current accounts in banks in order to carry on its activities, which included foreign-exchange transfers from and to other countries, including those for its customers in Slovakia. In the Division's view, the three banks concerned regarded Akcenta as a competitor that was providing services to their customers and were not best pleased that their profits had fallen as a result of its business, and they monitored Akcenta's activity, conferred with each other and decided by common agreement, to terminate, in a coordinated manner, the contracts they had concluded with Akcenta. Relying on evidence of contact between the three banks, including in particular a meeting held on 10th May, 2007, and subsequent email correspondence, the Division established that each of the three banks had agreed to terminate its contract with Akcenta on condition that the other two did the same, in order to prevent part of its clientele switching to whichever bank continued to hold Akcenta's current accounts. The Division concluded that the conduct of the banks in the relevant market, defined as the Slovak market for cashless foreign-exchange operations, constituted an agreement that was intended to restrict competition and it imposed fines of EUR 3,197,912 on Slovenská sporiteľňa, a.s., EUR 3,183,427 on Československá obchodná banka a.s., and EUR 3,810,461 on Všeobecná úverová banka a.s.

Following Slovenská sporiteľňa, a.s.'s, commencement of proceedings against the Division's decision, the Rada Protimonopolného úradu Slovenskej republiky (Council of the Competition Authority of the Slovak Republic 'the Council'), a second-level administrative authority, adopted, on 19th November, 2009, a decision that amended the contested decision by broadening the legal categorisation of the conduct at issue in the main proceedings. The Council did not alter the amounts of the fines imposed by the Division.

Judicial Proceedings

Slovenská sporiteľňa, a.s., challenged the Council's decision, bringing proceedings before the Krajský súd Bratislava (Bratislava Regional Court). By a judgment of 23rd September, 2010, the Krajský súd Bratislava annulled the decisions of 9th June and 19th November, 2009, in so far as they concerned Slovenská sporiteľňa, and referred the case back to the Protimonopolný úrad. In its judgment, the Krajský súd Bratislava stated, *inter alia*, that the Protimonopolný úrad had misinterpreted the concepts of the 'competitor' and the 'relevant market'. According to that Court, the Protimonopolný úrad had not determined whether Akcenta could be regarded as one of Slovenská sporiteľňa's competitors in the relevant market, given that it was operating in Slovakia without the requisite authorisation from the Národná banka Slovenska (Slovak National Bank); nor had that authority considered the question as to whether Akcenta's illegal activity could be accorded legal protection. The Krajský súd Bratislava pointed out in that regard that the Národná banka Slovenska had imposed a fine of EUR 35,000 on Akcenta on the ground that, from January, 2008, to June, 2009, it had been carrying out foreign exchange transactions in Slovakia without a license. At the same time, however, the Krajský súd Bratislava stated that the decision of the Národná banka Slovenska to impose the fine had been annulled by the Banková rada Národnej banky Slovenska (Banking Council of the Slovak National Bank) and that the investigation into Akcenta had been closed on the basis that a penalty could no longer be imposed on it because the limitation period applicable to financial penalties had expired. In addition, the Krajský súd Bratislava pointed out that it was clear from the documents before it that Akcenta was not a competitor to the banks concerned but merely one of their customers, since it was not providing services at the same level as the banks and it was operating on the basis of a different set of rules. The Krajský súd Bratislava also noted that the Protimonopolný úrad had not taken sufficient account of the circumstances in which the agreement at issue in the main proceedings had been entered into. It considered that it had not been proven, *inter alia*, that Akcenta had attempted unsuccessfully to reopen bank accounts with Slovenská sporiteľňa.

The Protimonopolný úrad brought an appeal against the judgment of the Krajský súd Bratislava before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic). The Protimonopolný úrad submitted that it had sufficiently substantiated its finding that Akcenta was one of the competitors to the banks concerned in the relevant market, namely the Slovak market for cashless foreign exchange operations. With regard to the allegedly illegal nature of the business carried on by Akcenta in Slovakia, the Protimonopolný úrad maintained that the fact that Akcenta carried on its business activity without the requisite license was not relevant to the purpose of examining the conduct of the banks concerned under the competition rules. It also noted that neither Slovenská sporiteľňa, a.s., nor the other banks, had questioned the legality of Akcenta's activity before initiating the procedure at issue in the main proceedings. It did not consider there was any proof that Akcenta was operating illegally. So far as the decision of the Banking Council of the Slovak National Bank was concerned, the Protimonopolný úrad noted that it concerned the period from January, 2008, to June, 2009, while Akcenta was operating on the Slovak market from 2003, and the relevant banks had coordinated their conduct and terminated the contracts with Akcenta in 2007. The Protimonopolný úrad also points out that that decision was annulled.

Slovenská sporiteľňa, a.s. contended that the Protimonopolný úrad had not given sufficient weight to the fact that Akcenta, which did not have the requisite license, was operating illegally on the relevant Slovak market. It submitted that since the necessary conditions of competition law were not met, a restriction of competition could not be pleaded. It argued that there was no reason to penalise conduct resulting in the exclusion of an undertaking that was operating illegally. It had not been established that the meeting held by the three banks on 10th May, 2007, resulted in an agreement, given that the employee who attended the meeting for Slovenská sporiteľňa, a.s. merely gathered information on the projected termination of contracts relating to Akcenta's current accounts.

In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Is Article 101(1) TFEU ... to be interpreted as meaning that it is of legal relevance that a competitor (trader) adversely affected by a restrictive agreement between other competitors (traders) was operating on the relevant market illegally at the time when the agreement was concluded?
2. For the purposes of interpreting Article 101(1) TFEU ... is it of legal relevance that, at the time when the restrictive agreement was concluded, the legality of that competitor's (trader's) conduct was not questioned by the competent supervisory bodies in the Slovak Republic?
3. Is Article 101(1) TFEU ... to be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is necessary to demonstrate personal conduct on the part of a representative who is authorised under the undertaking's constitution, or the personal assent in the form of a mandate, of that representative, who has, or may have, taken part in that agreement, to the conduct of one of the undertaking's employees, where the undertaking has not distanced itself from the conduct of that employee and, at the same time, the agreement has been implemented?
4. Is Article 101(3) TFEU ... to be interpreted as also applying to an agreement that is prohibited under Article 101(1) TFEU ... which, by its nature, has the effect of excluding from the market a specific individual competitor (trader), which has subsequently been found to have been carrying out foreign exchange transactions on the cashless foreign-exchange operations market without holding the appropriate license required under national law?

Ruling of the ECJ

The Court (Tenth Chamber) hereby rules in Case C-68/12:

1. Article 101 TFEU must be interpreted as meaning that the fact that an undertaking that is adversely affected by an agreement, whose object is the restriction of competition, was allegedly operating illegally on the relevant market at the time when the agreement was concluded, is of no relevance to the question of whether the agreement constitutes an infringement of that provision.
2. Article 101(1) TFEU must be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is not necessary to demonstrate personal conduct on the part of a representative who is authorised under the undertaking's constitution or personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting.
3. Article 101(3) TFEU must be interpreted as meaning that it can apply to an agreement prohibited under Article 101(1) TFEU only when the undertaking which is relying on Article 101(3) TFEU has proved that the four cumulative conditions laid down therein are met.

The Ruling of the Supreme Court

The Supreme Court of the Slovak Republic decided to make a judgment No. 3Sžh/4/2010 on 21.05.2013, and so changed the judgment on the Krajský súd Bratislava and dismissed the action by Slovenská sporiteľňa, a.s. In its judgment, the Supreme Court of the Slovak Republic stated, *inter alia*, that it must be recalled that Article 101(1) TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition in the internal market. For the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 508; and Case C-389/10 P *KME Germany and Others v Commission* [2011] ECR I-0000, paragraph 75).

The agreement entered into by the banks that were specifically concerned had, as its object, the restriction of competition, and none of the banks challenged the legality of Akcenta's business before they were investigated in the case that resulted in the main proceedings. The alleged illegality of Akcenta's situation is therefore irrelevant to the purpose of determining whether the conditions for an infringement of the competition rules are met. Moreover, it is for public authorities and not for private undertakings or associations of undertakings, to ensure compliance with statutory requirements. Relying on the evidence of contacts between the three banks, including, in particular, a meeting held on 10th May, 2007, and subsequent email correspondence, the Supreme Court established that Slovenská sporiteľňa, a.s. had agreed to terminate their contract with Akcenta on condition that the other two did the same, in order to prevent a part of their clientele from switching to whichever bank continued to hold Akcenta's current accounts. The Supreme Court concluded that the conduct of the banks in the relevant market, defined as the Slovak market for cashless foreign-exchange operations, constituted an agreement that was intended to restrict competition and imposed fines of Euros 3,197,912 on Slovenská sporiteľňa, a.s.

It is the person who relies on Article 101(3) TFEU who must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied (*GlaxoSmithKline Services and Others v Commission and Others*, paragraph 82).

Comment

It is the opinion of the Supreme Court that Slovenská sporiteľňa, a.s. put forward only one of the four cumulative conditions referred to in Article 101(3) TFEU. Even if, as stated by the parties to that agreement, the purpose was to force Akcenta to comply with Slovak law, it was for those parties to lodge a complaint with the competent authorities in that respect, and not to take it upon themselves to eliminate the competing undertaking from the market.

3.2. Lorenza Calcagno (Court of Genova, Italy), *Butangas Spa and Liquidas Spa v. Italian Competition Authority*

Facts

Butangas Spa, Liquigas Spa and ENI Spa are undertakings working in the Italian market in the distribution of LPG (liquid petroleum gas, in Italian the acronym is GPL), in particular in small tanks and bottles. In 2008, the Authority initiates proceedings on a presumed cartel among not only the firms named but also others, to determine the prices of GPL in tanks in Sardinia and other contractual clauses so as to compartmentalise the market. During the investigation, some undertakings presented proposals, but the Authority denied closing the procedure because of the nature of anti-competitive behaviour. At this point, ENI Spa asked to enter a leniency program and to give information about the existence of an agreement among the most important firms in distribution (such as Liquigas, Butangas and ENI) throughout the country, so as to control the price of LPG in tanks and bottles. As a consequence, the proceedings were limited to the three undertakings in order to verify an infringement of Art. 101 TFEU, which lasted for more than ten years. At the end of the procedure, the Authority showed the existence of an illegal agreement that had been finalised to control prices before the variations in the international quotations for the raw material, and the agreement was enacted through many meetings between the managements of the partners (Liquigas, Butangas and ENI). As a consequence of the application of leniency programme, ENI was not fined, but the other two firms were ordered to pay around six million euros (Butangas), and seventeen million euros (Liquigas).

The firms firstly filed an appeal to the TAR Lazio (the regional appeals tribunal which hears appeals from NCA decisions), as the judge of First Instance, asking that the decision be overturned. They held that the Authority had based the decision only on the information given by ENI and on the external circumstances of the common trend in the price lists, without a correct evaluation of the historical reasons for the trend being explained by the undertakings, so the decision was based only on presumptions. The First Instance judge confirmed the decision, so Liquigas and Butangas appealed to the Administrative Supreme Court (the Consiglio di Stato).

The Ruling of the Administrative Supreme Court

The first question examined by the Court is the role as evidence of the declarations of the applicant within the administrative procedure. The Judges first recalled the fundamental role of the declaration of the applicants, especially in inquiries on horizontal cartels that they defined as being one of the most serious threats to the free market (in this part it appears that the Judges know the words of the EU Commissioner, Neelie Kroes, in 2005 at the International Forum on European Competition Law). The Court declared that it was necessary in the judgment to balance, on one side, the necessity not to extend the use of presumptions too much and, on the other, the difficulties in finding evidence of anti-competitive behaviour in cases such as the one under discussion, in which normally no documentation exists. The Court, referring also to the case law of the General Court (Case T-68/00, *JFE Engineering* and Case T-59/07, *Polineri Europa*), stated that the declaration alone cannot be considered as full evidence of collusion, but it has a value that must be considered, above all when it comes from a manager of a company that plays an important role in the cartel. According to the Court, taking in consideration that it is rather difficult to find “full” evidence (i.e. a “smoking gun”) in relation to a cartel agreement, a too restrictive interpretation could jeopardize competition law enforcement. Consequently, in its ruling the Court affirms that an applicant’s declaration could be considered as full evidence of collusion confirmed by other elements. So, the declaration of the applicant remained central to the judgment into which other elements can be entered, as, for instance, in the case analysed, the inclusion of the trends in the list of prices; all relevant elements must be considered in a complete

and comprehensive framework. In conclusion, the declaration is central to the judgment and is considered to be of particular importance if it comes from the manager of one of the most important actors in the illegal collusion, and, at the end of an evaluation of presumptions, can give full evidence of a cartel.

In relation to the prices, the defendants argued that the only circumstance confirming ENI's declaration were the trends in the price lists, which are different from the final prices and are only important in evaluating the effectiveness of competition in the relevant market. On this question, the Court stated that it is not necessary to have proof of the exact levels of prices, considering their necessary flexibility, but the evidence must be aimed at the situation that pertains in the competitive process that determines the final prices.

So the Court confirmed the AGCM's (the Italian Competition Authority) decision.

Comment

The judgment that is examined here demonstrates the actual position of public enforcement on the declaration of leniency from the applicant. It is very clear how important the leniency procedure in a case such as the one treated, relating to hard-core cartels, can be. In this cartel, the declaration was considered the principal argument of the evidence, with the addition of other elements of presumptions. To conclude on the use of information, it is useful to remember that the declaration can be known only at the end of the investigation, when the Authority has transmitted the results of the inquiry. However, the real problem is the relationship between public and private enforcement in relation to the use of the leniency declaration in damages claims. In fact, the leniency programme is applicable in the framework of an infringement procedure, and is not directly applicable in civil actions. The importance of addressing the use of evidence found in leniency applications by plaintiffs in damages actions has been addressed in the Damages Directive. Actually, in Italy, administrative judges had already stated that it is possible to ask in civil procedures (such as follow-on actions) for access to the documents of the investigation file, using the tools of private procedure. For instance the judge may ask information directly from the Authority (because of the public nature of this subject), or the parties can ask the judge to order the Authority to permit access to documents that are relevant to the civil procedure (as, for example, in TAR Lazio n. 1344/2012, and for data access in TAR Lazio n. 10615/2009).

3.3. Andzej Maciejewski (Vilnius Regional Court, Lithuania), *Eksortus and Specialus Montażas – NTP v. Lithuania Competition Authority*

Judgment of the Supreme Administrative Court of Lithuania issued on 21st June, 2012.

Facts

Upon receiving the request of the applicant, SE Ignalina Nuclear Power Plant, the Competition Council by its decision of 03/09/2010 started an investigation into the actions of the business entities UAB Eksortus and UAB Specialus montažas – NTP, who were engaged in activities selling industrial metal and other products and in other related activities.

The request of the applicant, SE Ignalina Nuclear Power Plant, stated that the business entities referred to might have negotiated their tenders (proposals) with one other before submitting bids under public procurement procedures.

The Competition Council established that UAB Eksortus and UAB Specialus montažas – NTP had had a specific type of relationship that was not typical of competing business entities: each company shared information with the other about organised public calls for tenders. They helped each other to prepare commercial tenders and consulted one another about questions relating to their preparation, when they also revealed their prices. The business entities examined kept contact with one another regarding those questions which should have been confidential, according to the usual practice of competing business entities.

The Competition Council stated that the relevant business entities had not only kept in contact during the examined period of time, but had also cooperated in regard to several public procurements which were organised by SE Ignalina Nuclear Power Plant and UAB Vilniaus energija.

During the investigation performed at the premises of the examined business entities, it was established that they had communicated before submitting their tenders (proposals), phone calls between employees of the companies were registered on the eve of the public calls for tenders, and the final tenders submitted by both companies in response to the public call for tenders of SE Ignalina Nuclear Power Plant were, in principle, identical, i.e., the tenders had the same form, structure and layout, the title and font of the tenders were completely alike, as well as the numbers of the tenders, identical grammatical mistakes, text formatting and layout inaccuracies were in the same places, the prices of the offers were also written in an identical font, other documents included in the tenders were also the same: technical specification, the list of documents proving qualification, and the same grammatical mistakes and formatting inaccuracies were also found in these documents.

By the decision of 12th May, 2011, the Competition Council (National Competition Authority) decided that this similarity in tenders could not be explained by the objective circumstances or by explanations submitted by the business entities, and this meant that the tenders had been prepared jointly.

The Competition Council stated that UAB Specialus montažas – NTP could have submitted a supporting tender with a higher price so that UAB Eksortus would win the call for tenders organised by SE Ignalina Nuclear Power Plant. The tenders were negotiated between the examined business entities, UAB Eksortus and UAB Specialus montažas – NTP were not competing by submitting a better tender to SE Ignalina Nuclear Power Plant and they submitted tenders which had been negotiated in advance; therefore, the organiser of public procurement could not use the real benefits of competition and was forced to purchase goods under conditions of competition that had been imitated.

The Competition Council recognised that by negotiating the prices of the tenders, UAB Eksortus and UAB Specialus montažas – NTP violated the requirements of Article 5(1)(1) of the Law on Competition. UAB Eksortus was fined 52,400 Lt for violating Article 5(1)(1) of the Law on Competition, whereas UAB Specialus montažas – NTP received a fine of 334,200 Lt.

The Ruling of the Vilnius Regional Administrative Court

By the decision of 29th December, 2011, the Vilnius Regional Administrative Court dismissed the appeals of UAB Eksortus and UAB Specialus montažas – NTP as unfounded.

The Court stated that an agreement between competitors to directly or indirectly determine the prices of a specific good was seen as having an aim in itself to limit competition, and its negative impact on competition was presumed.; therefore, the argument of the applicants that the Competition Council had to prove that the business entities had the aim to limit competition was unfounded. With regard to the established circumstances, the Court concluded that the applicants had negotiated the tenders. They did not compete with one another to submit a better tender to the organisers of the procurement, but submitted tenders which had been negotiated in advance or in the course of later negotiations, which was why the organisers of the calls for tenders were unable to assess the real competitive conditions. The argument of the applicants that no other business entity suffered any damage due to the cooperation of the applicants in the relevant calls for tenders, which was established in the case, was considered by the Court to be unfounded because the mere fact that the contracting authority could not use the benefits of normal competition was considered as damage, since the tenders of the specific suppliers had not actually competed. As a result, the Court noted that the Competition Council had been right to conclude that, by their actions in the public calls for tenders, UAB Eksortus and UAB Specialus montažas – NTP had violated the provisions of Article 5 of the Law on Competition.

The Court stated that taking into account the fact that the agreements between the companies, their coordinated actions and decisions in the public call for tenders were considered one of the gravest violations of competition. The gravity of the offence of the applicants, which was the cartel agreement consisting of two episodes, was assessed as being very serious. The Court stated that it had not been established in the examined case which of the offenders was the initiator of the offence, and the data collected in the case confirmed that both business entities had taken actions which constituted the offence defined in Article 5 of the Law on Competition. There was therefore no ground for reducing the size of the fines. The Court noted that the performance of the orders of the Competition Council and the submission of the information requested might not be assessed as help provided by the business entities in the course of the investigation. In addition, the disputed decision imposed fines on the applicants amounting to 1.2% of their gross annual income, i.e., the imposed fine was not high if compared with the maximum size established by law. A greater reduction in the fine would therefore have denied the effectiveness of the fine's size, which had been imposed for the relevant offences and that had been determined by the legislator, as well as the determined aims for this kind of a sanction.

In the present case, the applicants had entered into the cartel agreement (i.e., the horizontal agreement between competitors on price coordination in public procurements), so the provisions concerning the impact of the minor importance of an agreement limiting competition are not applied.

The Ruling of the Supreme Administrative Court

By the decision of 21st June, 2012, the Supreme Administrative Court of Lithuania dismissed the appeals and upheld the decision of 29th December, 2011, of the Vilnius Regional Administrative Court.

The Court stated that the construction of Article 5 of the Law on Competition and the aim of the provisions laid down in this law made it possible to distinguish two categories of prohibited agreements: 1) agreements which in themselves limit competition and, 2) agreements where it is necessary to establish and prove that their aim is contrary to competition law or has a negative impact on competition. Having established that there was price fixing (a price cartel) in the case examined, the Competition Council was not obliged to prove that this agreement had been intended to achieve illegal aims. The agreement between competitors on the determination (fixing) of prices in presumes the existence of the intent to limit competition. Even if the parties to the agreement had other legal aims, as they claim, the aim of the agreement was assessed in this case not in the context of the civil law, but in the context of the competition law. The Court noted that the fact that there had been an agreement between the business entities was proven.

The Court concluded that the exception laid down in Article 5(4) of the Law concerning agreements of minor importance was not applied in relation to horizontal agreements on prices, irrespective of the scope of the agreements, the part of the market occupied by the business entities and other criteria – the *de minimis* rule (Article 101(1) TFEU) is not applied to agreements on the fixing of the prices of goods sold to third parties.

The Court noted that in a circumstance where the business entities were related by some mutual shareholders and employees and, for this reason could be seen as being related companies, this was not significant in terms of the competition law because the business entities that participated in the public procurements and that submitted commercial tenders, were seen as competitors.

The Judicial Panel noted that it was at the discretion of the Competition Council to perform a proper and comprehensive assessment of the factual circumstances by imposing sanctions on the business entities for not following the requirements laid down in the Law on Competition of the Republic of Lithuania and in determining their size. It was highlighted that one of the aims of imposing a fine for violations of the competition law was as a deterrent to committing an offence and therefore the imposition of very small economic sanctions, or exemption from paying them, would not help to achieve this aim. When imposing the fine, the Competition Council took into account the nature of the offence committed (a cartel agreement on prices), its gravity (serious), the procurements in which the applicants participated and negotiated the prices (two), the duration of the offence (which does not exceed the period of one year), aggravating and mitigating circumstances (none), as well as the impact each of the business entities had on the committing of the offence (the initiator was not identified, both entities had the same role), and it was right to impose fines which amounted to 1.2% of the gross annual income of the applicants. These fines made up only 1/8 of the size of the maximum fine which could be imposed; therefore, it was concluded that the size of the fines was founded and legal.

3.4. Csilla Szabó (Budapest Metropolitan Court, Hungary), *Adeptus Zrt. and others vs Hungarian Competition Authority*

Judgment of the Hungarian Supreme Court No. Kfv.III.37.084/2009/15.

Facts

The Road Management and Coordination Directorate (a state authority) published some public procurement tenders on road and bridge construction and renovation in 2001 and 2002. The leaders of fourteen noted construction companies met several times in 2001 and 2002 and kept negotiating. The participants agreed which companies would win which public procurement tenders, what amount and percentage they would share from each project, what construction work they would or would not do, and what consideration they would get.

The Hungarian National Competition Authority initiated a procedure *ex officio* to examine the public procurement tenders on road and bridge construction. They especially examined whether there were any anti-competitive negotiations or agreements between the market participants. During the procedure they held dawn raids at the premises of six companies. All of them took part in the above mentioned negotiations.

As a result of the dawn raids, of the documents found and the witness statements, the National Competition Authority held that the fourteen undertakings involved had infringed section 11 of the Hungarian Competition Act, which contains the same ruling as Article 101 of the TFEU.

The Authority defined as a relevant market the road and bridge construction and renovation activity of 2001 and 2002 in the territory of Hungary, where the Directorate was the procurer (the demand side), and the road and bridge construction companies the entrepreneurs (the supply side). The Authority found that the documents impounded during the dawn raids, together with the witness statements, proved that market sharing and price fixing agreements had existed and the companies had agreed on the winner of each of the tenders. Although one of the companies had only a passive role, the lack of protest that was expressed related to a unity of will. The undertakings involved were competitors in this market, because all of them are construction companies which can enter into public procurement tenders as tenderers.

The Authority imposed on the fourteen undertakings involved an 11,897,000,000 HUF (40,943,906 EUR) lump sum fine. In determining the basis of the fine, the Authority took into account the turnover of the relevant market, but amended the income from the public procurement tenders published by the Directorate in 2001 and 2002, by the payments that had been made between the undertakings involved and that they had paid to each other. It considered as aggravation that, as the result of the hardcore cartel, the procurer's (and through this the consumers') interests had been seriously harmed, and considered and also that the Authority had found similar violations in many of the 2001-2002 tenders, so it was a widespread practice in the road and bridge construction market in those years. It also calculated, against the undertakings, that the national budget was attacked by their anti-competitive conduct. The Authority did not qualify any of the companies as being the organiser of the cartel. It did not identify any extenuating circumstances.

According to the Authority's published point system for stipulating the sum of the fine, each undertaking got 25 points because they had endangered competition, 20 points because of the market effect of their anti-competitive conduct, 10 points because of the common market share of the related companies, 5 points for their active conduct in the cartel, 5 points for their negligence, and 5 further points because they had involved the national budget.

Judicial Proceedings

The undertakings challenged the decision of the National Competition Authority before the Court. They stated that their agreements were only negotiations between a general constructor and subcontractors and consortium settlements, which are legitimate under the Public Procurement Act. They did not accept the definition of the relevant market. They asked the Court to ignore some illegally gained evidence. Regarding the amount of the fine, they lacked individual consideration and referred to improper discretion being used in regard to the facts and evidence.

The First Instance Court essentially approved the decision of the National Competition Authority. The Court settled on the same facts that were relevant to the Authority's decision and agreed the legal arguments of the Authority. It held that the definition of the relevant market was correct and, according to the decision, the Authority had evaluated the conduct of each company individually when it had decided on the amount of the fine. Referring to the companies' argument that the negotiations between the general constructor and the subcontractors and consortium settlements are legitimate under the Public Procurement Act, the Court emphasised that conduct which is legitimate under the Public Procurement Act can be anti-competitive and can break the rules of the Competition Act. The Court stressed that the limit of the fine is the net revenue of the undertaking, under that limit its bearing orients the amount. The Court found that considering the turnover of the relevant market as the basis of the fine was against the law, but the fines imposed were only 0.007–1.5 % of the companies' annual net revenues. However, while the Court did not accept the determination of the basis of the fine, it did accept the discretion of the Authority in determining the amount of the fine.

The undertakings appealed against the First Instance Judgment on the basis of the same reasons as they had offered in challenging the decision of the Authority, but the Second Instance Court approved the First Instance Judgement. It corrected the definition of the relevant market as being the road and bridge construction and renovation activity in the scope of the public procurement tenders in 2001 and 2002 in the territory of Hungary, where these companies are substitutes for each other on the supply side.

The entrepreneurs submitted an appeal to the Supreme Court, but the Supreme Court approved the judgment of the Appeal Court.

Comment

The public procurement market is a special market, where competition is restricted. The aim of the restriction is to ensure the transparency of state procurements, to reach prices for state investments that are as low as possible and to ensure the proficiency of the participants in state projects. When the tenderers go into a price-fixing and market sharing hardcore cartel, it harms not only the procurer, the state, but through this all citizens because, indirectly, all the citizens are consumers in the market for public procurements. The relevance of this case is to emphasise that, even in this, market competition must be maintained among the companies that are able to meet the requirements for public procurement tenders.

3.5 Francisco Paneda Usunariz (Gijón Commercial Court, Spain), *TOBAR v. CEPSA, Estaciones de Servicio S.A.*

Facts

The current procedure started with a claim issued on 3rd February, 2004, by a company (from now on TOBAR) against the enterprise CEPSA, ESTACIONES DE SERVICIO, S.A (CEPSA). In short, TOBAR wanted the ruling to be the following: 1) They wanted to be recognised as a re-seller of petroleum products; 2) They wanted the court to rule that the contract with a service station for the 'use of brand name and image, technical and commercial assistance and supply on a commission-agent basis', dated on 7/2/96, be declared void, to apply to both parties, arguing that this was against the law (Art. 81(1) EC), and the Commission Regulation (EEC) No 1984/83 of 22nd June, 1983, on the application of Article 81(3) of the Treaty to categories of exclusive purchasing agreements, as amended by Commission Regulation (EC) No 1582/97 of 30th July, 1997; 3) and, as a consequence, they claimed that CEPSA should pay the difference between the prices effectively paid by TOBAR to CEPSA (without commissions), in accordance with the contract, and the weekly prices that were proven to have been offered or paid by other authorised operators/suppliers in the same regime.

The defendant, CEPSA, opposed the claim and issued a counter-demand with the following petitions:

- 1) That the contract be declared valid and in force;
- 2) That TOBAR broke the contract by ignoring the exclusivity clause included in the contract;
- 3) That TOBAR has the obligation to fulfill the contract until it expires;
- 4) To condemn TOBAR to compensate for the damages generated by the breach.

TOBAR's arguments can be summarised in three points:

- 1) the economic regime of the contract was not an agency agreement, but a sales agreement;
- 2) They also used as a defence the fact that the contract overcomes the maximum length allowed by the Commission Regulation of 1983, and this would allow CEPSA to unilaterally and absolutely fix the prices of fuels, the final price to the consumer, and the profit margin at point of sale.

CEPSA's arguments were that:

- 1) the contract was an agency agreement, thus it wasn't affected by the prohibition in Art. 81(1) EC,
- 2) in regard to the contract's length, they argued that important investments meant there was an advantage for TOBAR, in that its market share was not above 30%.

In relation to the true nature of the contract, the judge followed the 'financial risk' criteria to conclude that TOBAR had assumed the risk according to the clauses included in the contract: risk for fluctuations in the price of the petroleum products supplied; the risk of loss or damage of the products, and so on. These circumstances led the judge to consider the contract one that was a 'firm purchase commitment', and not an agency agreement. In regard to the length of the contract, the judge affirmed that it exceeded the five year term established by the law (specifically, the agreed term was 10 years).

It is pointed out that the contract imposed contained restrictive practices as CEPSA (supplier) fixed both prices: the one paid by TOBAR to CEPSA, and also the retail price (RP).

The court rejected CEPSA's counter claim, and declared void the contract agreed by the parties, condemning CEPSA to pay the price difference claimed.

The ECJ's Preliminary Ruling

Once the appeal was issued, the national court requested a preliminary ruling to clarify what it called the 'agency concept' in European Competition Law.

In relation to sales distribution, if the relationship between the two parties located in different steps in the distribution channel was based on a sales contract, Art. 81.1 EC was to be applied to the relations. However, if it was about a representation contract, then it wasn't. That's how it was understood by the Communication in 1962 regarding exclusive representation contracts subscribed to by agents.

The reason for not applying Art. 81.1 EC to authentic agency contracts is that, according to Art. 81.1, there is no 'agreement among companies', but the agent is acting while integrated with the principal.

The ECJ ruled on September 11th, 2008 (Case C-279/06), when answering the preliminary questions posed by the national court, mostly reproducing what it had already declared in its previous ruling from 14th December, 2006 (Case C- 217/05, *CEEES*).

More specifically, the ruling declared the following:

'35- The Court held, at paragraph 38 of *CEEES*, that vertical agreements such as the agreements between CEPSA and service-station operators were covered by Article 81 EC only where the operator is regarded as an independent economic operator and there is, consequently, an agreement between two undertakings'

The Court explained the criteria which would allow the national Judge to appreciate, taking the facts into account, the effective distribution of the commercial and financial risks between the owners of the petrol stations and the fuel suppliers. The Court ended up by affirming that a contract for the exclusive supply of fuel can be included into Art. 81.1 EC when the owner of the petrol station assumed in a relevant proportion, one or more of the commercial and financial risks that are related to the sale of these products to a third party, and such a contract includes clauses that could undermine the game of competition, such as the one referring to the fixing of retail prices.

On the contrary, if the petrol supplier doesn't assume those risks (or not a relevant part of them) the only clauses that could be applied, according to Art. 81.1 EC, are the exclusivity and the no competition clauses.

In the end, the ECJ declared that: '(1) An exclusive supply contract for motor-vehicle and other fuels, as well as lubricants and other related products, is capable of falling within the scope of Article 81(1) EC where the service-station operator assumes, in a non-negligible proportion, one or more financial and commercial risks linked to the sale of those products to third parties and where that contract contains clauses capable of infringing competition, such as that relating to the fixing of the retail price. If the service-station operator does not assume such risks or assumes only a negligible share of them, only the obligations imposed on the operator in the context of services as an intermediary offered by the operator to the principal, such as the exclusivity and non-competition clauses, are capable of falling within the scope of that provision. It is for the referring court to ascertain, moreover, whether the contract concluded on 7th February, 1996, between CEPSA Estaciones de Servicio SA and LV Tobar e Hijos SL, has the effect of preventing, restricting or distorting competition within the meaning of Article 81 EC'.

The second questions requested by the Court of Madrid concerned the interpretation of Regulation n° 1984/83, and the possibility of extending the term for more than the five years.

More specifically, the Court asked if the contract's object of this dispute fulfilled the requirements established by Art. 10 and 12 of the Regulation of 1984/83, regarding the application of Art. 85.3 EEC (currently 101.3 TFEU), to certain categories of exclusive sale agreements in relation to the maximum length of the 'no competition covenant'. The national court asked if, in order to allow the exclusive

supply clause to exceed five years, the economic and financial advantages must be substantial, or if they only need to be more than significant.

The answer of the ECJ was as follows:

‘54.- It follows that the concept of ‘special commercial or financial advantages’, referred to in Article 10 of Regulation No. 1984/83, must be interpreted as meaning that those advantages are indeed specific to the contractual relationship, but that they must also be substantial in order to justify an exclusivity of supply for 10 years. Those advantages must be such as to lead to an improvement in distribution, to facilitate the establishment or modernisation of the service station and to lower the distribution costs’

Finally, the ECJ established that:

‘2. An exclusive supply contract, such as that referred to in the preceding paragraph of this operative part, is capable of benefiting from a block exemption provided for in Commission Regulation (EEC) No 1984/83 of 22nd June, 1983, on the application of Article [81](3) of the Treaty to categories of exclusive purchasing agreements, as amended by Commission Regulation (EC) No 1582/97 of 30th July, 1997, if it complies with the maximum duration of 10 years referred to in Article 12(1)(c) of that regulation and if the supplier grants the service-station operator, in return for exclusivity, substantial commercial advantages which contribute to an improvement in distribution, facilitate the establishment or modernisation of the service station and lower the distribution costs. It is for the referring court to assess whether those conditions are satisfied in the case in the main proceedings’.

The Ruling of the Court of Appeal of Madrid

The ruling of the Court was in favour of dismissing the First Instance Court ruling by declaring the validity of the contract. Regarding this, the Court resolved the questions placed following the ruling of the ECJ:

Firstly, regarding the condition of TOBAR, it concluded that it has features characteristic of the commission or agency contract, as the risk is not a defined item of the agency contract from the internal law point of view, but an accidental feature that exists according to agreement from the parties. However, at the same time, it remarks that ‘this agent’ does assume other risks that are not insignificant (commercial and financial), that is why it can’t be considered as a ‘genuine’ agent, but as a ‘non genuine’ agent, and thus the contract between TOBAR and CEPSA can be considered to be included in Art. 81.1 EC, not only in what is referred to as exclusivity and non-competition clauses (which would be in every case, according to the ECJ’s case law), but also to those regarding price fixing.

Secondly, regarding the agreement covered by Art. 81.1 EC, the Court analysed whether it was exempt from being void as it fulfilled the requirements demanded by the Block Exemption regulation. So, starting from the interpretation carried out by the ECJ in the ruling of 11th September, 2008, the Spanish Court concluded that there are specific advantages of the contractual relationship since they referred to the technical facilities necessary for the activity of the petrol station, which improve the distribution, facilitate the installation or modernisation of the petrol station, and reduce the distribution costs, as they prevent the owner of the petrol station from spending an important amount of money at the moment of settling or renewing its installation and, because of their nature, they appeared as key to justify an exclusivity of supply for ten years.

Finally, the Court concluded that the contract was null because CEPSA had unilateral power to fix the sale price without any possibility for TOBAR to apply discounts. In relation to this subject, the preliminary ruling of 2008 declared that the Spanish courts had the competence to decide whether TOBAR had any real opportunity to reduce the consumer sale price (nº 71).

In this case, on November 2nd, 2001, CEPSA sent an authorisation letter to TOBAR to apply discounts, and the Appeal Court understood that this communication proved the impossibility of TOBAR applying any discounts during the contract.

The Ruling of the Spanish Supreme Court

The Spanish Supreme Court dismissed the CEPSA appeal, arguing that the Madrid Court of Appeal had correctly interpreted the ECJ's preliminary ruling. The Supreme Court insisted that the Appeal Court correctly ascertained that the contractual clause relating to that sale price can be amended by the unilateral authorisation of the supplier, and whether the contract, which is automatically void, may become valid following an amendment of that contractual clause.

Comment

The importance of this case law is the exclusion of a principal-agent relationship from the scope of Art. 81 EC (currently 101 TFEU) when the agent is not an independent trader. The significant preliminary ruling issued by the ECJ on 11th September, 2008, during the Spanish proceedings, related to a contract between a service-station operator and its supplier, and identified a 'genuine agency agreement' as being when the agent does not bear any of the risks, or bears only negligible risk, resulting from the contracts negotiated with third parties on behalf of the principal. In this case, as well as the Case C-217/05 (*Confederación Española de Empresarios de Estaciones de Servicio – CEEES*), the Court ruled that the decisive factor for determining whether the supplier is an independent economic operator is the agreement, express or implied, relating to the assumption of the financial and commercial risks linked to the sales of goods to third parties, which must be assessed on a case-by-case basis.

Consequently, where, under an exclusive supply contract, the operator assumes the financial and commercial risks are linked to the sale of products to third parties to a non-negligible extent, any anti-competitive clauses that fix the retail price in such an exclusive supply contract fall within Art. 101.1 TFEU.

Even in the case of a genuine agency agreement, Art. 101 applies to a non-competition or exclusivity clause requiring the agent to source its fuel exclusively from the principal. This is because that kind of clause restricts the agent's commercial freedom as an operator on the agency services market.

Nonetheless, such a clause may merit exemption if the relevant conditions are met. In particular, a ten year exclusivity clause may be justified if the financial and commercial benefits conceded by the supplier are so important that, in their absence, the service station operator could not have entered the agency services market for the sale of fuel.

This is one of the Supreme Court's numerous rulings relating to relationships between service station operators and suppliers (in civil jurisdiction as well as public enforcement, such as SAN 7/11/2007 and 1/21/2008; STS (3^a) 3/3/2005 and 5/4/2007; STS (1^a) 10/3/2007, 11/20/2008, 4/15/2009, 6/30/2009; 2/15/2012...) which have taken place in Spain in recent years and have generated several rulings by the ECJ.

3.6. Francisco Paneda Usunariz (Gijón Commercial Court, Spain), *BCN Aduanas y Transportes v. Spanish Competition Authority*

Facts

On December 1st, 2011, the *Comisión Nacional de la Competencia* (CNC) – a national institution in charge of guaranteeing compliance with laws relating to competition – sanctioned the enterprises BCN ADUANAS Y TRANSPORTES, S.L. (BCN) and BOFILL ARNAN, S.A with a fine of €1,184,000, due to infringement of Article 1 of Law 15/2007, July 3rd, on the Defence of Competition, and Art. 101 of TFEU, which consists of fixing prices, either directly or indirectly, as well as other sales or service conditions.

This Decision was appealed by BCN before the Audiencia Nacional (AN), asking for the nullity of the decision and the sanction, which delivered its ruling on June 24th, 2013.

It is not the aim of this paper to deal with the behaviour declared as being collusive by AN. A great amount of documentation was presented by CNC in the case, which led to the conclusion that BCN had taken part in numerous meetings that were carried out in order to fix prices with its competitors on a regular basis. The relevance of this Decision is, in our opinion, in the considerations around the quantifying of the fine, and the nature of the 10% of the total turnover obtained by the firm during the previous business year, which is included in Art. 63.1.c of the Spanish Defence of Competition Act, as well as in Regulation 1/2003, in Art. 23(2)

The Limit of 10% in the Calculation of the Fine

The Decision of the AN, in its point nº 6 (page 15, a), offers a singular interpretation of Article 63, by reference to Article 25 of the Spanish Constitution regarding the rule of law, which denies the possibility of imposing sanctions that are not previously referred to by the law (*nulla poena sine lege*). According to this Court, the minimum sanction will be 0% and the maximum 10%, making it necessary for the fine to be adjusted within this scale, bearing in mind any mitigating and aggravating circumstances, evaluating the length and the gravity. The violation of Art. 1 of the Defence of Competence, Spanish Law is considered as being very serious (up to 10% of the total turnover made by the undertaking in the business year prior to the fine).

The Spanish Court considers that the limit of 10% of turnover represents the will of the law regarding what is the biggest sanction that can be imposed, due to infringement of the Competition Law. In this sense, when the Spanish Competition Authority calculates the sanction it will have to assume that 10% is the maximum sanction and must be reserved for the most serious infringements, whereas the less severe ones must be sanctioned with a fine far below 10%. This interpretation would be in accordance with the Spanish Constitutional Court that, following the principle of the Rule of Law, demands that the law determine the criteria with which to calculate the fine.

However, this doctrine contradicts European jurisprudence and the European Commission, more specifically, the judgment of the General Court on December 12th, 2012, (Case T-352/00 *Novacke Chemické v European Commission*), which points out that the amount that corresponds to 10% of the worldwide turnover would be a ‘capping ceiling’, which means a limit on the sanction that can be demanded, and not so much on the sanction that can be imposed. In this case, the 10% limit would not affect the calculation of the fine, which would be settled by the Commission according to its seriousness and to the length of the infraction, it can only be taken into account after the fine is declared in the case that it exceeds the 10% limit, thus reducing it to such an amount.

The decision of the General Court says the following:

(161) ('With regard to the applicant's argument that the fine imposed on it was very close to the maximum ceiling of 10% of worldwide turnover (see paragraphs 152 and 153 above), it must be observed that the applicant misconstrues the nature of that ceiling. The sum corresponding to 10% of the worldwide turnover of a participant in an infringement of the competition rules is not, contrary to what the applicant seems to believe, a maximum fine, to be imposed only in respect of the most serious infringements. As is apparent from the case-law, it is, instead, a capping ceiling, the only possible consequence of which is that the amount of the fine calculated on the basis of the criteria of gravity and duration of the infringement will be reduced to the maximum permitted level. Its application implies that the undertaking concerned will not pay the fine which in principle would be payable if it were assessed on the basis of those criteria (*Dansk Rørindustri and Others v Commission*, cited in paragraph 47 above, paragraph 283)').

In the same way, the ruling of the General Court of June 16th, 2011 (*Case Putters International vs Commission*).

The practical consequences of adopting one interpretative criterion or another is clearly important, for the following reasons:

- 1) the interpretation of the limit by the Spanish Court gives greater importance to mitigating factors, since they would apply to a fine that cannot exceed 10% of the business turnover, and not to the total amount of the fine (which could be greater than this 10%);
- 2) this criterion leads to the principle of proportionality: that the 10% fine can only be applied for the most serious behaviour possible, which is why the majority of fines will be below that limit.

This Decision of the Spanish Court seems to follow the German Supreme Court doctrine expressed in its judgment of February 23rd, 2013 (Bundesgerichtshof, KRB 20/12), regarding a cement cartel, in which, based also on the principle of the Rule of Law, in other words, the Law (and not the Administration) must be the one to establish the criteria with which to calculate the fine. So, the Court understands that the 10% limit it is only applicable once the sanction has been fixed.

The Calculation of the Total Turnover in the Previous Financial Year

In this case, the Spanish Court also carries out an interpretation of the Law with important practical consequences. It thus moderates the penalty imposed by the Spanish Competition Authority, stating that it must refer exclusively to the worldwide turnover of the specific branch of the activity in which the infringement occurred, and not to the worldwide turnover of all the economic activities of the undertaking.

To reach this conclusion, the Spanish Court considered the following elements: 1) the proportionality between the fine and the infringement; 2) the purpose of the Law, none other than the penalising behaviours that are contrary to free competition in a specific area; 3) the segment affected by the collusive behaviour. The Spanish Court, to support its argument, uses the criteria followed by the EC in the application of the 2006 Guidelines (Guidelines on the method of setting fines) that appeared in point 21 of the Sentence previously quoted:

(‘21. In the first place, the Commission determines a basic amount for each undertaking or association of undertakings. The Commission takes the value of the relevant undertaking's sales of goods or of services to which the infringement directly or indirectly relates in the relevant geographic area (point 13). The basic amount of the fine is related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement (point 19). Periods longer than six months but shorter than one year are counted as a full year (point 24). The proportion of the value of sales taken into account may, as a general rule, be set at up to 30% of the value of sales (point 21)').

As we have said, the practical consequences are especially relevant because the ECJ considers all the companies that take part in the same business holding as an 'undertaking', even if the infringement

was carried out by a small branch with no active intervention from the parent company of the group as, in these cases, the 10% limit cannot be applied.

However, it cannot be mistaken for the ‘value of sales to which the infringement relates’, which is taken into account by the 2006 Guidelines in calculating the fines imposed when applying Art. 23.2.a of Regulation EC 1/2003 (DO 1/9/2006; Method for setting of fines, ‘value of sales’ -point 13-), with the ‘total turnover in the preceding business year’, which is not limited to the market affected by the infringement, on which the 10% limit is applied.

It is obvious that, if we follow the first criterion, the fine will lose its deterrent effect, due to its substantial decrease, since the penalty seeks to take into account the economic strength of the undertaking in each case.

3.7. Cláudia Roque (Competition Tribunal, Portugal), *Madeira's driving schools SMTZ and others v. Portuguese Competition Authority*

Judgment of the Lisbon Commercial Court; Proceeding No. 659/11.3TYLSB

Facts

The Portuguese Competition Authority decided on 24/2/2011 that by establishing contacts for the purposes of discussing future prices, some driving schools, notably those mentioned above, infringed TFEU Article 101(1) and similar provisions of the Portuguese Competition Act, and they consequently imposed sanctions, namely fines.

The administrative authority held that such behaviour distorted competition in Madeira's driving schools market and this led to a rise in the applicable prices.

The above-mentioned driving schools appealed to the First Instance Court (at the time, the Lisbon Commercial Court) saying that there were no contacts on the subject of future prices, and that prices did not rise any higher than they would have done as a result of the normal play of supply and demand.

On 27/2/2012, the decision was upheld on appeal by the Court in relation to the driving school SMTZ – Ensino de Condução Automóvel, Lda., as there was no proof that the other driving school participated in any meeting or equivalent contact on the subject of future prices.

The Court judgment emphasised that this was a clear infringement by object, regardless of the effects of such behaviour.

The Court also stated that the fine of 2.731,36 Euros, applied by the Portuguese Competition Authority could not be raised, because of the prohibition of *reformatio in pejus*.

Comment

This case is a typical cartel case.

Some of Madeira's driving schools were having meetings and other types of contact on the subject of future prices that could be applied, distorting competition in the relevant Madeira Island driving schools' market.

This case was an opportunity for the Court to recall that the Commercial Court, under Law 18/2003, of 11th June, was limited by the principle of prohibition of *reformatio in pejus*, meaning that the Appeal Court could not impose a fine higher than that imposed by the Competition Authority.

In the meantime, the law has been changed, and presently the Competition, Regulation and Supervision Court may impose fines higher than those imposed by the Administrative Authority in an appeal filed by the defendant (Article 88 of Law 19/2012, of 8th May).

This has been a very controversial issue and is still being discussed, as some people consider it is an inadmissible limitation of the defence's rights.

However, we have to bear in mind that this is not a criminal proceeding, and that the defence's rights must be balanced with the other principles and values that are to be protected.

Note that European Courts may also modify and increase the amounts of fines imposed by the Commission.

‘The General Court has unlimited jurisdiction with regard to fines imposed by the Commission. The General Court is therefore empowered, in addition to carrying out a mere review of the lawfulness of those fines, to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed’ (Judgment of 22nd November, 2012, on the basis of Article 31 of Regulation 1/2003).

The Court of Justice also has the jurisdiction to ‘assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine’ (Case Case C-441/11 P. *Commission v Verhuizingen Coppens NV*, Judgment of 6th December, 2012).

The effectiveness of the fine is essential for the purposes of Competition Law in order to dissuade future infringements. It is important, therefore, that the Court has the powers to review the case in matters not only of facts and law, but also of the amount of the fine imposed.

3.8. Helena Nogueira (Competition Tribunal, Portugal), *Portuguese Competition Authority v. Baxter – Médico Famacêutica, Lda and Glintt – Business Solutions, Lda.*

Facts

Since 2/01/2002 Baxter has been the only owner of representation rights in Portugal for ‘Automed’ products, including the ‘FDS 330’ and its components and accessories.

The FDS 330 is equipment that combines a component - a dispensing system - with a computer and its software, that allow the reception and processing of information, namely, from the hospital pharmacy system. This permits, among other things, the automatic debiting, in individual and identified packages, of every patients’ medication.

On 11/11/2005 Baxter agreed a contract with Glintt, in which Glintt would have the exclusive commercialisation of that equipment to the final consumers, but they would be obliged to abide by Baxter’s price policy and to agree with Baxter on the annual sales objectives. Baxter would still maintain the possibility to commercialise the same equipment (in the position of being a competitor with Glintt itself) and would maintain the exclusivity of its installation, technical support and assistance.

In an addendum to the contract (Anexo II) it was established that, in 2006, Glintt would have to buy three of FDS 330; ‘the Glintt price’ (acquisition price that Glintt would pay) and ‘the market price’ (the retail price that Glintt could offer) was also established for the years 2005 and 2006, for the equipment, the connected components and consumable items.

During 2006, both undertakings, who were the only contestants, presented proposals to three different public contests to provide three Hospitals with an automatic system for the repackaging and dispensation of medication in unitary doses, offering the supply of FDS 330.

At the time, FDS 330 was the only equipment that had been commercialised in Portugal for automatic repackaging, in units, of solid oral forms of medications.

That specificity was an essential requirement in the three contests.

In those contests, Glintt’s proposal to supply FDS330 offered the same price as that agreed with Baxter in the contract as being the ‘market price’.

In another contest during 2006, Glintt has also offered the price that had been established with Baxter for the sale of FDS 330.

The Decision of the National Competition Authority

The National Competition Authority (AdC) considered that the two companies had violated Articles 4º, 42º, 43º, nº1, al.a) and 44º of the Law 18/2003, of 11/06, and that their conduct was likely to affect trade between Member States, also violating Article 101(1) TFEU.

The NCA therefore condemned Baxter – Médico Famacêutica, Lda and Glintt – Business Solutions, Lda to pay, respectively, a €145,296.77 fine and a €385,471.24 fine, and to publish an extract of the decision, at their expense, in the *Diário da República* (The Portuguese Official Journal) and in a nationwide newspaper.

The two defendants appealed against this decision to the Lisbon Commercial Court.

The Ruling of the Lisbon Commercial Court

The Court, in essence, confirmed the NCA's decision, although it reduced Baxter's and Glintt's fines to €100,000.00 and €300,000.00. In short, the Court considered that:

- Being commercial societies, seeking profits, both defendants were to be considered 'undertakings' and could be submitted to national competition law;
- The contract was a vertical agreement, since it was agreed between a supplier and a retailer, and it related to the determination of a 'market price', as a price at which to sell to the final consumers;
- The identification of the relevant market that was presented by the NCA – the supply of automatic equipment for the repackaging of oral solid medications, FDS and its connected services – was correct, since the specificity of the automatic repackaging function was an essential requirement of the contests in which the defendants took part, there were no existent equivalent or exchangeable products that consumers could use and, as it was the national territory, the geographic market had to be taken into account;
- Pricing must result from the play of a free market, adjusted between the provider of the good or service and the client, and it was not for a third party to impose that price on the others. The agreement therefore interfered, in a noticeable way, with the regular functioning of the market, in spite of the effective results that it may or may not have caused;
- The defendants did not prove the cumulative requisites for 'economic benefit' that could justify their practice;

The CNA did not prove that the defendants' conduct had, or could have, an impact on the economic activities of at least two member states, interfering, in a noticeable way, in those activities, thus violating Article 101 of TFUE.

Comment

This case is one of the few in the Portuguese courts that concerns anti-competitive agreements. The most interesting aspect, from my point of view, is that it illustrates the similarities of the national legal criteria and European law criteria, as we can see in the analysis of the definitions of terms such as 'undertaking', 'agreement' and 'relevant market', or in the application of the *de minimis* rule. However, the lack of use of, or appeal to the European Court's jurisprudence to integrate those legal concepts also reveals how national judges are still unfamiliar with that resource.

4. Competition Law Enforcement *vis a vis* Professional Associations

4.1. Mira Raycheva (Supreme Administrative Court, Bulgaria), *Bulgarian Medical Association v. Bulgarian Competition Authority*

Decision No. 508/03.05.2012 of the Bulgarian Commission for the Protection of Competition

Decision No. 13/13.01.2013 on Case No. 7144/12 of the Supreme Administrative Court of Bulgaria (First Instance Court)

Decision No. 7351/30.05.2013 on Case No. 3538/13 of the Supreme Administrative Court of Bulgaria (Second Instance Court)

Facts

The Bulgarian Medical Association is a non-governmental organisation established under the Professional Associations of Physicians and Dentists Act. According to this Act, all doctors practicing in the territory of the Republic of Bulgaria must be members of the Bulgarian Medical Association (hereinafter referred to as the 'Association').

The organisation is independent from the government. The specialised executive body - the Ministry of Health – has no right to take part in the Association's decision-making and has no control mechanisms that relate to its decisions.

By virtue of the Professional Associations of Physicians and Dentists Act, the Association can impose sanctions that are provided for in the Act concerning the way the doctor's profession is practiced.

The national management of the Association is carried out by Convention, an Administrative Council, a Control Committee and a Committee for Medical Ethics.

The Convention is convened for regular sessions once every three years, and for extraordinary ones when necessary, and it represents a national representative body which has the powers, along with others, to accept or amend the Association's Statute and the Code of Professional Ethics (the Code). Observance of this document is obligatory for all doctors (who are also mandatorily members of the Association). The document mentioned above provides for the seeking of material or non-pecuniary liability for any breaches by any of the Association's members.

According to domestic legislation (Article 81 of the Health Act), every Bulgarian citizen has the right to accessible health care, which is provided under the law and the National Health Insurance Act.

Bulgarian citizens have the right to a package of medical services that are paid for on the basis of insurance coverage by the National Health Insurance Fund (NHIF).

Health insurance for Bulgarian citizens is obligatory. Every medical treatment that is included in the medical services package, is paid for by the NHIF at previously specified and agreed prices.

The medical services that are not included in the main insurance package, as well as those provided to non-insured citizens (for whatever reason), are paid for at prices that are specified by every doctor providing the service in their individual medical practice.

When the above mentioned medical care is provided by a medical institution it is paid for at prices approved by the medical institution itself. Articles 56 to 59 of the Code regulate the remuneration

doctors receive for their work. The Code also sets a minimum threshold rate, approved by the Union, for each respective activity.

Article 63 of the Code provides that the Commission of Professional Ethics controls the observation of this obligation and has the right to sanction any breaches thereof.

At the Convention held on 15th-17th April, 2011, a decision was taken that the minimum fee for a medical examination in the conditions of an individual practice should be at the rate of 10% of the minimum salary for the country (at that time, around 240 BGN – 120 Euros), or not less than 24 BGN (12 Euros).

The Decision of the Bulgarian Competition Authority

During the proceedings, the Association stated that the legal procedure is inadmissible because the Bulgarian Medical Association is not an undertaking in accordance with Art. 15 of the Protection of Competition Act. The Association also claimed that the approved minimum price for a given medical service is a guarantee of quality and does not limit competition, since each doctor has the right to individually negotiate the price for the medical service above the mentioned minimum rate.

In Decision No. 508/03.05.2012, the Commission held that the legal procedure is properly constituted and that there should be a pronouncement on the essence of the problem, as the decision of the Convention is valid and applicable to a particular activity that is an essential part of the relevant market and that involves its realisation in the territory of the entire country.

In its decision, the Commission held that the Association, in general, is not an undertaking according to Art. 15, para. 1 of the National Competition Act, but its members have the same status as that given to undertakings, since it provides a service that is paid for by the patient. In this regard, the Commission based its arguments on the practice of the Court of Justice of the European Union, and especially on the *Pavel Pavlov* case (Joined Cases C 180/98/ C 184/98 *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [1998] ECR I-6451). On this basis, the Commission defined the Association as being an ‘association of undertakings’ that can be subject to a violation according to the Protection of Competition Act.

The Association’s decision to set a minimum price for a medical service was qualified by the Commission as being a ‘decision of an association’, according to Art. 15 of the Protection of Competition Act, and that it can be qualified as a violation of Art. 15, para. 1 of the same act since it has an anti-competitive aim.

In its decision the Commission accepted that there was no denying that the above-mentioned anti-competitive aim has been pursued, since the decision restrained the effective competition by not giving any possibility for an independent and liberal determination of the prices of a given medical service.

The Commission also noted that the decision of the Association referred to the specific market segment (considering the essence of the product and the geographical market) and that, in practice, it affected the prices for medical care, as it was binding on the practising doctors in Bulgaria.

In the light of the foregoing, the Commission did not accept the arguments of the Association that its action constituted the ‘positive regulation of an activity which is a liberal profession’, stating that this regulation should be directed at the quality of the service delivered, rather than to a restriction on the right to the liberal formation of the due monetary remuneration.

The Commission also refused to accept the arguments that the above-mentioned activity is in the powers of the Association in accordance with Art. 57, para. 2 of the Code of Professional Ethics. It noted that this activity is a violation of Art. 15, para. 1 of the Protection of Competition Act in so far

as it is void by virtue of law and cannot be accepted as a reason for minimum prices for the care provided.

When defining the sanction imposed on the Association, the Commission assessed the violation as being severe and it imposed a fine amounting to 120,000 BGN (approximately 60,000 EUR). In its argumentation, the Commission emphasised the duration of the violation, its significant impact on the relevant market and on the fact that it hindered the access of the parties to medical help.

The Proceedings before the Supreme Administrative Court

The Association appealed the Commission's decision before a three-member panel of the Supreme Administrative Court.

The particular complaints were based on the alleged unlawfulness of the decision, due to the fact that the Association could not be subject to the violation because it is a public body recognised by legislation and judicial practice, and not 'an association of undertakings'. The Association also claimed that the decision had been taken on the basis of a legislative act that was in force and that fell under the exceptions of Art. 17 of the Protection of Competition Act. The claimant also stated that the decision was discriminatory and not in conformity with the fact that the prices for services, delivered by notaries and private officers of the Court, are regulated in an analogical way. The amount of the fine was also contested.

In its judgment of 3rd January, 2013, the Court considered all the complaints against the Commission's decision and decided to leave the decision as it stood. The Court pointed out that the Association was a legal entity - a public organisation that implemented its activities by virtue of the law, but these functions were not connected with the possibility to determine the minimum prices of the care provided. On these grounds, the Court rejected the complaint that the Association's decision came under the scope of Art. 17, para. 1 of the Protection of Competition Act.

The Court rejected the claimant's thesis that the decision was pronounced in accordance with Art. 57 of the Code, thus accepting the Commission's conclusion that this decree (order) is null and void as it contradicted Art. 15, para. 2 of the Protection of Competition Act.

Examining the complaint that the Commission's decision was discriminatory, the Court did not share the Association's position and pointed out that the regulation of the prices for medical care, services delivered by notaries and private officers of the Court, is not made by the respective professional organisation, but by the Government.

The First Court Instance accepted that the Commission's decision is, in substance, lawful as to the conclusion on the amount of the fine. The additional arguments for substantiating the above-mentioned conclusion are the annual income of the Union - over 800,000 BGN (approximately 400,000 EUR), and also the fact that the amount of the fine corresponds to the violation made.

An action for annulment was brought by the Bulgarian Medical Association against the decision of the three-member panel of the Supreme Administrative Court before a five-member panel of the same Court. The Association disagreed with all the above-mentioned conclusions of the Court.

As an argument in support of its complaints, the Association stated that the Commission and the First Instance Court had unlawfully refused to consult experts as to the value (price) of the medical examination, thus depriving the Association of its right to prove that the sanctioned activity fell under the scope of Art. 17, para. 1 of the Protection of Competition Act.

The Highest Court Instance accepted as lawful the following conclusions of the First Instance Court: 1. that the Association could be subject to violation of Art. 15, para. 1 of the above-mentioned Act; 2. that its decision in fixing the minimum prices for medical attention constitutes a violation of Art. 15, para. 1. In this context, the Court accepted that the activity, the object of the cases, is relevant

to the respective market on the basis of a product and a geographical principle, and it is also relevant to all the medical care that is delivered and not paid for by the National Health Insurance Fund in the territory of Bulgaria. These services are estimated as being an economic activity. The doctors delivering them are qualified as being ‘an undertaking’ according to paragraph 1, p. 13 and p. 7 of the Protection of Competition Act.

The Highest Court Instance also assessed as being lawful the Court’s conclusion on the unlawfulness of the Association’s decision, due to its contradiction of Art. 15, p. 1 of the law. According to the Court, the complaint that the Association’s right to collect evidence is violated is unfounded, and the motives for this can be derived from the fact that the law provides no opportunity to assess the cost price of a medical examination and, consequently, consulting experts on such a task is completely pointless.

In the Highest Instance Court’s decision, the Court also shared the conclusions of the Bulgarian Competition Authority and the First Instance Court, that the fine imposed is fair and proportionate given the severity of the violation.

On these grounds, the appealed decision was left in force.

Comment

I find this case interesting as its object is an action of a non-governmental and non-economic organisation to whom regulatory functions in regard of a substantial segment of the market-protection for health have been delegated. One of the decisions of this organisation has been considered to have violated the special law that protects competition. I consider the Commission’s and the Court’s decisions, that the competitive environment may be affected not only by economic subjects but also by all other non-governmental and non-economic organisations, fundamental, and all the relevant conclusions should be drawn only from the essence of the decision taken and its meaning in the relevant market segment.

4.2. Elisabete Assunção (Lisbon Court of Commerce, Portugal), *Association of Navigation of Portugal (AGEPOR) v. Portuguese Competition Authority*

Dates of the judgments: **28.07.2006 – First Instance Court of Lisbon;**
 15.03.2007 – Second Instance Court of Lisbon;
 29.04.2009 – Portugal Constitutional Court.

Introduction

This case is one of the cases concerning price fixing and was decided in the Commercial Court of Lisbon. This particular case concerns the existence of a table of maximum prices that is not compulsory. The decision was confirmed in the Second Instance Court, with the intervention of the Portuguese Constitutional Court, but this Court didn't decide the object of the appeal. I must say that most of the cases decided in Portugal that concern public enforcement are 'price fixing cases'.

Facts

By a decision of 24.05.2006, the Portuguese Competition Authority applied a fine of €195,000.00 on the Association of Navigation of Portugal, because they had established a table of maximum prices for navigation agents (although these were not compulsory). The Portuguese authority considered that the decision had the effect of restraining competition between navigation agents, interfering in the determination of prices for services in a free market. The Portuguese authority also considered that the decision of the Association was a decision of the association of undertakings.

The AGEPOR – The Association of Navigation of Portugal -- appealed the decision saying, among other things, that:

1. The decision was not valid, because the Portuguese Competition Authority didn't give access to all of the documents in the process to the appellant;
2. The decision did not respect the right to defence of the appellant, and the privilege against self-incrimination;
3. The Association was not subject to competition law, because it wasn't an association of undertakings.
4. The table of prices did not infringe competition law, because it was not compulsory.

Judicial Proceedings

The First Instance Court considered, in a preliminary judgment, that the defendant could have access to some of the documents of the process, those that did not protect the secrets of third party businesses.

Then, in the final judgment on the First Instance, the Court considered that the Portuguese Competition Authority respected the rights of the defendant throughout the process, particularly the right not to self-incriminate.

Concerning the question of the application of competition law to associations, such as the defendant, the Court concluded that the Association could be considered an association of undertakings, quoting some European rulings. The Court also analysed the relevant market and concluded that the price fixing affected competition, restricting competition in the market. It also concluded that the fixing of prices violated Article 81 of the E.C. Treaty.

The Court applied a fine of €130.000,00 and ordered the publication of part of the decision. The Court also decided that the defendant must cease their conduct.

The Second Instance Court confirmed all their decisions. The Portuguese Constitutional Court didn't decide for the object of the appeal, because it understood that the articles that were considered unconstitutional were not applied in the decisions of the First and Second Instance Courts.

Comment

This decision is very important because it was one of the first decisions that decided on questions of the:

Defendant's access to confidential documents, respecting the secrets of third party businesses;

The 'right to silence' of the defendant.

It was also relevant, again, to clearly determine that this type of association could be considered an association of undertakings.

4.3. Elisabete Assunção (Lisbon Commercial Court, Portugal), *Association of Doctors of Portugal v. Portuguese Competition Authority*.

Date of the judgments: **18.01.2007 – First Instance Court of Lisbon;**
 22.11.2007 – Second Instance Court of Lisbon;
 03.12.2009 – Portugal Constitutional Court.

Introduction

This case was decided in a period when the Portuguese Competition Authority applied fines on some professional associations in Portugal for price fixing. This particular case was very interesting, because it was confirmed, not only in the Second Instance Court, but also in the Portuguese Constitutional Court.

The intervention of this last Court was very particular because, among other questions, it had to rule on whether the intervention of the Portuguese Competition Authority and of the Portuguese Commercial Court violated the Portuguese Constitution.

Facts

By a decision of 26.05.2006, the Portuguese Competition Authority applied a fine of €250,000.00 on the Professional Association of Portuguese Doctors, because they established mandatory prices for doctors, offering a minimum and maximum price. The Portuguese authority considered that the decision had the effect of restraining competition between doctors in the liberal regime, interfering in the determination of the prices for services in a free market.

The Portuguese authority also considered that the decision of the professional association was a decision of an association of undertakings.

It is important to note that only the doctors who are members of this association, are allowed to practice in Portugal. The Association has a code that practitioners are obliged to respect.

The Professional Association of Doctors appealed the decision, saying that:

1. The Portuguese Competition Authority wasn't competent to apply the fine, because of the public quality of the Association, and because this authority had no competence to apply Articles 81 and 82 of the E.C. Treaty;
2. The Portuguese Court had no jurisdiction to rule on the issue, and also, because of that public quality, the competent court should be the Administrative Court.
3. The Association was not subject to competition law, because it wasn't an association of undertakings.

Finally, it also said that the decision to fix prices did not infringe competition law, and the elements used to apply the fine were incorrect.

Judicial Proceedings

The First Instance Court considered, in a preliminary judgment, that the Court had the jurisdiction to judge on the matter, because it was a decision of the Portuguese Competition Authority to apply a fine, and the Commercial Court was, at the time, the competent court to consider these decisions on appeal.

Then, in the final judgment on the First Instance, the Court considered that the Portuguese Competition Authority was competent to apply fines on professional associations, such as the defendant, because the Portuguese law of competition makes no distinction. The Court also considered that the Portuguese Competition Authority could exercise all of the competencies that Community law gives to the national competition authorities.

Concerning the question of the application of competition law to professional associations, as the defendant, the Court concluded that the Association could be considered an association of undertakings, quoting some European rulings. The Court also analysed the relevant market and concluded that the price fixing affected competition, restricting competition in the market. It also concluded that the fixing of prices violated Article 81 of the E.C. Treaty.

The Court applied a fine of €230.000,00 and ordered the publication of part of the decision.

The Second Instance Court confirmed all of the decision.

The Portuguese Constitutional Court considered that there was no violation of the constitution in the decision.

Comment

The decision, or decisions, referred to here were important in shedding some light on the competence of the Portuguese Competition Authority to apply fines to this type of association, and of the competence of the Court in the matter.

It was also relevant to clearly determine that competition law could be applied to liberal professionals and their associations, which are considered to be associations of undertakings, and also because of the intervention of the Constitutional Court.

4.4. Cláudia Roque (Competition Tribunal, Portugal), *Ordem dos Técnicos Oficiais de Contas v. Portuguese Competition Authority*

- **Judgment of the Tribunal of Lisbon No. 938/10.7TYLSB.L1-5**

- **C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* (2013) n.y.p. ECR**

Facts

The Order of Chartered Accountants (Ordem dos Técnicos Oficiais de Contas - OTOC), is a professional association under a public law statute, with training, ethical and disciplinary powers over all of the chartered accountants in Portugal, who must be members of this association.

The OTOC adopted a Training Credits Regulation, establishing a system of compulsory training for accountants (Regulamento da Formação de Créditos, published in the Portuguese Official Journal, *Diário da República*, II, of 12/7/2007). According to this regulation, accountants are required to have obtained an annual average of 35 training credits that are provided or approved by the association. A minimum of 12 credits per year should relate to ‘institutional training’, and they are intended to make the accountants aware of legislative initiatives and amendments and of questions of ethical and professional conduct, provided exclusively by the OTOC. ‘Professional training’, consisting of study sessions on topics that are central to the profession, can be provided either by the OTOC or by other bodies that are approved by the Association. The decisions for approval of the registration of such training bodies, and of the approval of the training sessions that are proposed, should be taken by the Association after the payment of the respective fees and in compliance with several criteria that are imposed by the OTOC (e.g., applications for approval should be submitted at least 3 months prior to approval, professional training programmes must last longer than 16 hours).

The Portuguese Competition Authority decided, on 14/5/2010, that by adopting such regulations, the OTOC had infringed, *inter alia*, TFEU Article 101(1) and the similar provisions of the Portuguese Competition Act. The administrative authority held that the regulation constituted a decision of an association of undertakings that distorted competition in the market for the compulsory training of chartered accountants, as it reserved one third of the market for OTOC and in the remainder of the market, which was segmented by the OTOC, the Association decided who were its competitors and on what conditions. Consequently, sanctions were imposed on the Association, including a fine and the prohibition of the application of the above-mentioned regulation.

Judicial Proceedings

The OTOC appealed to the First Instance Court (at the time, the Lisbon Commercial Court), but the decision was upheld on appeal by the Court in relation to the infringement of Article 101(1) (Judgment of 29/4/11).

The Association appealed to the Second Instance Court (at the time, the Lisbon Court of Appeal), which, on 15/11/11, decided to stay the proceedings and submit the case to the European Court of Justice (ECJ) for a preliminary ruling.

In Case C-1/12, on 28/2/2013, the ECJ declared that a regulation adopted by a professional association, such as the one under analysis, should be regarded as a decision of an association of undertakings within the meaning of TFEU Article 101(1).

The Court recalled *Wouters* (Case C-309/99), saying that EU competition rules do not apply to activities that do not belong to the area of ‘economic activity’, considering the nature of their aims and the rules to which they are subject. However, the compulsory training regulation had a direct impact on the market for compulsory training for chartered accountants, where the OTOC itself carried out an economic activity.

The fact that the OTOC was required by law to implement a system of compulsory training for accountants was found not to be relevant, as it is unable to remove the rules adopted by that Association from the scope of EU competition law. Rules adopted by a professional association remain government measures, outside the scope of EU rules that are applicable to undertakings only when the EU State defines the public interest criteria and the essential principles with which the association’s rules must comply, and retains its power to adopt decisions in the last resort, which is not the case.

The Court stated that a regulation adopted by a professional association that puts into place a system of compulsory training for chartered accountants constitutes a restriction on competition, which is prohibited by EU law to the extent to which, and this is a matter for the national court to ascertain, it eliminates competition within a substantial portion of the relevant market, to the benefit of that professional association, and in so far as it imposes on the remaining portion of that market, discriminatory conditions to the detriment of the competitors of the association.

The ECJ stated that, for the purposes of analysing the effects which the regulation has on competition, the Portuguese Court will have to analyse the structure of the market in order to decide whether there is justification for the distinction drawn between the two types of training – institutional and professional – on the basis of their objectives, duration and the bodies authorised to provide them. By decreeing that 12 of the mandatory annual credits had to be obtained from institutional training, which could be provided only by the OTOC, the ECJ found that the regulation reserved for the Association a significant part of the relevant market. The Court also mentioned that, for example, the matter of legislative developments could be included in the professional training, open to other operators. Furthermore, each professional training programme had to last longer than 16 hours, which might prevent alternative training bodies from offering short training programmes.

Secondly, the Portuguese Court will have to examine the conditions of access to the market for bodies other than the OTOC, in order to establish whether equality of opportunity is guaranteed between the various economic operators or if the conditions of access to the relevant market are to be considered discriminatory. The court noted that the OTOC’s professional training was not subject to an approval procedure, although private bodies had to ask for specific approval for each of the training sessions at least three months in advance and to pay a fee. Furthermore, the regulation’s rules for training bodies were found to be drafted in vague terms, which could lead the OTOC to distort competition by favouring its own training programmes. The requirement that applications for approval must be submitted at least 3 months prior to approval may also deprive others of the opportunity to offer training on current issues in the immediate 3 months.

The ECJ rejected the argument that the regulation was exempt under Articles 101(3) and 106(2) as the regulation eliminated competition in a substantial part of the training for accountants, and appeared to go beyond what was necessary to ensure the improvements in accountants’ services (Article 101(3)) and, furthermore, it appeared to go beyond the performance of the particular tasks assigned to the OTOC, even if considered to be a general economic interest activity (Article 106 (2)).

A final judgment of the Lisbon Appeal Court is expected to be handed down soon.

Comment

This case may be considered particularly interesting in the future when regulations issued by professional associations in relation to compulsory training for their members, for example, doctors, lawyers, engineers, architects, pharmacists, are analysed.

In the light of the ECJ ruling, such associations may be considered to operate in the market for compulsory training in direct competition with other private training bodies.

Applying the well-known principle that entities that carry out economic activities are subject to competition law rules, a regulation of a public association regarding compulsory training for its members must be considered as coming from an association of undertakings for the purposes of Article 101(1). Even if a professional association is mandated by national law to provide compulsory continuing education to its members, it is not immune to the effects of EU law.

Consequently, when enacting rules on the compulsory training of their members, such public associations must comply with competition law, and unless there is a serious objective justification – to be subject to a cautious case-by-case analysis –, not reserved to themselves a significant part of the market, affecting the normal play of supply and demand, and it should establish conditions of access to the market which grant equality of opportunity to all operators, whether public or private. Such rules should be clear, objective, transparent and non-discriminatory, and allow for further control, including by the courts.

This ECJ preliminary ruling may allow us, in future cases, to raise questions in relation to the institutional and professional training activities that must be opened to competition with privates and the importance of implementing a clear separation between the economic and regulatory functions of certain professional associations.

4.5. *Ambrasaitė Goda (Vilnius Regional Court, Lithuania), Orthopaedics companies and National Health Insurance Fund (NHIF) v. Lithuania Competition Authority*

Judgment of the Supreme Administrative Court of Lithuania (SAC) on 17th May, 2012

Introduction

On 17th May, the Supreme Administrative Court of Lithuania passed the final ruling upholding the Competition Council's decision of 20th January, 2011, to impose fines on the Association of Providers of Orthopaedic and Rehabilitation Services and nine companies engaged in the production of, and trading in, orthopaedic devices, for concluding a cartel agreement.

Facts

The investigation was started in response to information from a participant in the market concerned. The inquiry carried out by the Competition Council led to the conclusion that in the period from 2006 to 2010, members of the Association of Providers of Orthopaedic and Rehabilitation Services and the Association of Orthopaedic and Medical Industry Undertakings had concluded agreements concerning the prices of orthopaedic technical articles, quantities for production, and were sharing the funds allocated by the NHIF for compensation for orthopaedic means. These agreements caused the distortion and restriction of competition in the market for orthopaedic means that is paid for by the budget of the CHIF for those who are insured. The agreements concerned damage inflicted on the State budget, as the participants therein had been using non-competitive prices, which further led to an inefficient use of the budget funds, and the NHIF, operating with limited resources, could thus provide services to many fewer patients. The agreements also incurred direct damage to patients, as the companies supplying orthopaedic technical means, by acting in concert, did not compete, which caused higher prices and the poorer quality of the articles. Having assessed the data obtained in the course of the inquiry, the Competition Council concluded that by entering into the agreements concerned, the undertakings did infringe Article 5 of the Law on Competition of the Republic of Lithuania. Having considered that the agreements entered into by the undertakings could affect trade between Member States, the Competition Council also concluded an infringement of Article 101 of the Treaty on the Functioning of the European Union. The Competition Council also arrived at the conclusion that, having provided the preconditions for such prohibited agreements and by organising the compensation for such orthopaedic means, the NHIF had selected inappropriate measures and had thus failed to ensure fair competition in the market and therefore had infringed the requirements of Article 4(1) of the Law on Competition of the Republic of Lithuania.

The undertakings claimed that they had concluded the agreements as obliged by the relevant legal acts and the NHIF, and that the competition law provisions mentioned could not be applied to them. The claimants argued that their actions were not subject to individual decisions, but were imposed by intensive legal regulation and the actions of administrative authorities, directed towards balancing the budget of the Compulsory Health Insurance Fund.

The Ruling of the Supreme Administrative Court

The SAC, basing its judgment on the relevant practice of the ECJ (ECJ judgments in Joined Cases C-359/95 P and C-379/95 P, Joined Cases 209 to 215 and 218/78, Case No. 41/83 (1985), Joined Cases 240/82, 242/82, 261/82, 262/82, 268/82, 269/82, Case No. C-198/01, Case No. T-66/99), has ruled that

Articles 85 and 86 of the EC Treaty (presently Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. However, the ECJ has recognised only a very limited possibility not to apply Articles 101 and 102 of the TFEU on the grounds mentioned. The conclusion that the operators in question enjoyed no autonomy (that their anti-competitive behaviour was required by the actions of the state authorities) can only be reached if it appears, on the basis of objective, relevant and consistent evidence, that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressure, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses.

The SAC later noted that just the fact that the basic price of orthopaedic devices is fixed at the state level by the legal norms, does not mean that competitive activity between companies engaged in the production and trading in orthopaedic devices was eliminated. Firstly, companies can compete when proposing that the basic price be established - the system of compensation for orthopaedic means allows competition in the procedure of establishing the basic price. Secondly, competition is possible when selling partially compensated orthopaedic means, as the companies engaged in the production and trading in orthopaedic devices can freely decide whether to apply surcharges, and how big those surcharges should be.

The SAC also stated that none of the applicable legal acts granted the Ministry of Health or the NHIF the powers to impose compulsory decisions related to the procedures of the establishment of basic prices on the companies. Legal acts also do not obligate either the Ministry of Health or the NHIF to demand a concerted position or concerted data from the companies. Moreover, the evidence of the case does not prove that the Ministry of Health or the NHIF have requested the anti-competitive behaviour of the companies through the exercise of irresistible pressure, eliminating the possibilities for the companies to act otherwise. It was established that the NHIF was informed about the agreement on prices, had supported the actions of the companies in agreeing on the output rates, and was providing the companies with the information that was necessary for the relevant decisions. However, those actions, in the opinion of the SAC, cannot be regarded as irresistible pressure. These kinds of actions by a state authority means they have knowledge about the anti-competitive behaviour of the companies and, to a certain extent, of the stimulation and tolerance of it, which, following the practice of the ECJ, does not eliminate the liability of companies (e.g., Judgments of the ECJ in Cases No. 229/83, T-7/92). The fact that the NHIF was found to be failing to ensure fair competition in the market, and therefore to be infringing the requirements of Article 4(1) of the Law on Competition of the Republic of Lithuania, does not preclude sanctioning the companies for violation of the Article of the TFEU.

5. Abuse of Dominant Position

5.1. Agnieszka Pieńkowska (Myszków District Court), *Stalexport Company v. Polish Competition Authority*

Facts

In 2008, the Office for Competition and Consumer Protection (UOKiK) imposed a PLN 1.3m fine on StalExport Autostrada Małopolska Company, (SAM) the concessionaire of the A4 motorway stretch running from Katowice to Cracow, for collecting the full road toll fees, despite conducting road works which made using the motorway difficult for drivers, as the number of lanes available was not up to the motorway standard. According to the Office, the repair work should not affect the traffic and, if it does, the toll should be lower. The company had two weeks to appeal against the decision to the Court for Competition and Consumer Protection, and then to subsequent court instances, which might take several months. Until a legally binding ruling was reached, SAM did not have to comply with the UOKiK's decision. However, if the company lost the appeal, they would have to pay up to EURO 10,000 per day of delay in enforcing the decision. The UOKiK President, Marek Niechciał stated that the Office's proceedings proved that the repair work had taken up nearly one third of the whole 60 kms. stretch at a time.

By resolution of KRT No. 09/2008 of 25th April, 2008, the Chairman of the Office for Competition and Consumer Protection imposed a PLN 1.3m fine on StalExport Autostrada Małopolska SA. The reason for the decision was a violation of the Bill of 2007 on Competition and Consumer Protection (Art 10 and 9) by StalExport through the abuse of their dominant position in the market of road transportation between the cities of Katowice and Kraków. The fine was imposed for charging drivers the standard price for using the motorway while the motorway was being renovated, and thus this did not comply with the motorway standards requirements.

The StalExport Company appealed against that decision. In their appeal they asked for the fine to be annulled or substantially lowered. The justification they provided was that they had not been using any unfair business practices.

The company also pointed out that the fine was inadequate to their possible breaking of the competition law. They also applied for the price they were charging to be considered a public tribute, rather than a price.

StalExport committed themselves to providing their service in a continuous and uninterrupted manner, with the exception of those situations where maintenance works were necessary.

The contract the company had signed, allowed the concessionaire to fix and adjust the toll price in accordance with the terms contained in the contract and its appendix.

Court Proceedings

The court proceedings found that, in 2007, the repair works were being carried out on consecutive stretches at times with a traffic flow that was open in only one lane, which caused traffic congestion and consequently slowed traffic down.

It must be put forward that there were no other roads in the area that would comply with the requirements necessary for the road to be classed as a motorway.

The court proceedings also established that the notion put forward by the StalExport Company, for circumstantial witness evidence to be allowed in the case, did not in fact contribute anything substantial to the case and only served to delay the court proceedings.

The following was established based on the fact that all the circumstantial evidence substantial to the case had already been brought into the proceedings.

With that situation in place, the regional court - the Department for Fair Competition and Consumer Protection -- established that the appeal did not meet the requirements so that it could be allowed.

The Court put forward the fact that the claim that the road toll was not a price but a public tribute, cannot be a serious one.

Here, the simple justification is that the StalExport Company operates with a view to financial gain and is therefore not a charitable institution.

The road toll is the company's income and is by no means the government's or the country's income. The Court also pointed out that the terms of the concession contract provide the maximum range of road toll prices that are due to be paid to StalExport.

This allows the company to adjust or change the price within the specified range in certain situations.

The Court recognised that there were no roads in the surrounding area that met the criteria in order to be classed as a motorway - that is, a road that has at least two lanes running in each direction with the maximum speed allowed of 120 km/h.

A motorway is also supposed to have a central reservation with barriers running alongside it. Travelling on a motorway is carried out at greater speeds than it is on other public roads. That convenience is the justification for the road toll being in place.

The claimant - the StalExport Company -- has the whole 100% of the specified local market as there is no other motorway connection between the cities of Katowice and Cracow.

The Court did not allow the claim that the company was obliged to impose the road toll. According to the rules of the right to negotiate the terms of the contract, only the maximum rate of the toll price is specified in the contract, which allows the concessionaire to lower the toll, or not to charge it at all.

With that taken into account, the court decided that since the motorway did not meet the criteria in order to be classed as such, it was illegal to charge the road toll, especially during repair works.

The StalExport Company appealed against that ruling to the Appeal Court in Warsaw, claiming on the same terms as they had with their first appeal before the Regional Court.

The Appeal Court dismissed the appeal, sharing the opinion of the Regional Court.

The Appeal Court stated that the term 'local market' is defined in one of the European Commission rulings, according to which it is an area where entrepreneurs conduct their business activities. In this case, the local market is contained within the area between the cities of Cracow and Katowice.

Accordingly, the Appeal Court advised that it shared the opinion of the First Instance Regional Court, saying that there were no substantial motorway connections between the two cities. StalExport, at the time of the road works on the stretch of the A4 motorway between Cracow and Katowice, also charged the maximum (under the terms of the contract) toll without adjusting it, and the road, at the time of the works, did not meet the criteria for motorways.

For this reason, the Appeal Court dismissed the company's appeal.

5.2. Colm Mac Eochaidh (High Court, Ireland), *Island Fisheries Teoranta v. The Minister for Communications, Marine and Natural Resources*

Facts

The plaintiff company (Island Fisheries Teoranta) is the owner and operator of a number of vessels engaged in the provision of passenger services between Rossaveel Harbour, in Co. Galway, and the Aran Islands. The company is obliged to pay certain harbour charges which are defined, imposed and payable under orders made by the first named defendant under the provisions of the Fishery Harbour Centres Acts 1968-1980 (the '1968 Act'). The dispute in this case arose from the imposition of increased charges introduced by Ministerial Order with the adoption of the Fishery Harbour Centres (Rates and Charges) Order 2003 (the '2003 Order'). The plaintiff contested the legality of these new charges and of the new regime and refused to pay the increased amounts on the basis that it was *ultra vires* the powers of the Minister under the 1968 Act; that the Minister acted unlawfully in imposing charges by abusing a dominant position in breach of s. 5 of the Competition Act 2002 (the '2002 Act'); or, alternatively, that the provisions of the 1968 Act were unconstitutional. As a result of the failure to pay the fees, the plaintiff had one of his vessels detained for a period until it was released on a bond.

The First Ruling of the Irish High Court (18th October, 2011)

The three complaints were examined in turn by the High Court. It was held by Justice Cooke that the 2003 Order was *ultra vires* the powers of the Minister as having been made upon a basis that could not have been contemplated by the Oireachtas (Parliament) in conferring the charging power under the 1968 Act. In reaching this finding, Justice Cooke held that the 2003 Order had a 'manifestly severe and unreasonably oppressive impact upon the plaintiff'. In particular, he criticised the manner in which charges under the 2003 Order were introduced by imposing an immediate and dramatically increased operating cost on the plaintiff; the manner in which the charge was formulated as a departure fee for passengers, failing to take into account public service contracts with another Government Department which constrained the plaintiff; the failure to consider the distinct uses and facilities of the harbour in question; the failure to fix a fair or reasonable commercial price; and the ambiguity around whether the charge was imposed as the price for the use of the harbour by the ferry operator and its vessels, or as a fee to passengers for its use in embarking and disembarking.

Justice Cooke then proceeded to address the contention that the Minister abused a dominant position, rendering the 2003 Order illegal as a violation of s. 5 of the 2002 Act. In that regard, the alleged abuse consisted of the Minister's use of his statutory control over the operations of the harbour and his ability to fix prices for the unilateral use of facilities to extract additional revenues in order to defray a deficit by the imposition of prices which were excessive, unfair and discriminatory. However, as the Court held that the attempt to impose those charges failed, the abuse did not occur and the coercive use of market power did not take place. As such, he held that it must follow that there could be no infringement of the prohibition contained in s. 5 of the 2002 Act.

However, Justice Cooke then went on to examine that claim on the basis that the 2003 Order was valid in aid of any potential assessment and remittal of the matter to the High Court by the Supreme Court, should one of the parties appeal the decision. He found that the Minister was an 'undertaking' for the purposes of the 2002 Act. In this regard, he noted that the Minister was operating the harbour facility by allowing commercial activities and services to be provided in return for fees and charges imposed and that the harbour was an essential facility due to its particular characteristics. Justice Cooke was of the view that it was clear that the Minister, as operator of the harbour, occupied a dominant position in respect of the market for the provision of facilities for the operation of sea

transport services to the Aran Islands and as such s. 5 of the 2002 Act was applicable to the conduct of the Minister. Further, he was of the view that the imposition of a *per capita* passenger charge by the 2003 Order on one class of harbour user would have infringed s. 5 of the 2002 Act. Finally, he noted that the fact that the Minister has a statutory function and a duty to promote the fishing industry did not alter the effect of s. 5, and that once it was established that the Minister is an ‘undertaking’ and that the undertaking occupies a dominant position in the relevant market, the competition rule applied as it stands. There is no provision of the Competition Acts 2002 – 2006 which mitigates or alters the prohibition in deference to the obligation of a public undertaking to discharge public interests tasks, he found.

The Second Ruling of the Irish High Court (25th June, 2012)

Following the delivery of the above judgment, Justice Cooke heard further evidence and submissions on the plaintiff’s claim for damages on the basis of the findings made therein. The plaintiff sought both compensatory and exemplary damages and, while acknowledging that the findings of the Court in relation to s. 5 of the 2002 Act were made on a conditional basis, also asked the Court to additionally make a conditional award of damages under s. 14 of the 2002 Act for breach of competition rules. The plaintiff sought a total of €249,825 made up of: the cost of the bond in respect of the detained vessel; lost profits on the non-operation of vessels; and staffing costs, *inter alia*, in this regard

Justice Cooke followed the decision of *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23 in his assessment of damages, to the effect that the *ultra vires* exercise of a power does not of itself provide the basis for an action in damages. Rather it will found an action in damages in any of the following situations: ‘1. If it involved the commission of a recognised tort, such as trespass, false imprisonment or negligence. 2. If it is actuated by malice, e.g., a personal spite or a desire to injure for improper reasons. If the authority knows that it does not possess the power which it purports to exercise.’ The plaintiff contended that the detention of its vessels was an actionable trespass, there being no legal debt due to the Minister as it had not been lawfully imposed. This view was accepted by Justice Cooke, who proceeded to examine the differing estimates provided in respect of the various costs incurred. Having assessed the costs incurred and also holding that certain costs were not recoverable, the Court granted €67,243 in special or compensatory damages to the plaintiff.

The Court then looked at the plaintiff’s claim in respect of exemplary damages and noted the *dicta* of Lord Devlin in *Rookes v. Barnard* [196] A.C. 1129, as approved in *McIntyre v. Lewis* [1991] 1 I.R. 121 and *Conway v. I.N.T.O.* [1991] 2 I.R. 305, to the effect that: ‘(1) The plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. (2) The power to award exemplary damages constitutes a weapon which, while it can be used in defence of liberty, can also be used against liberty. The learned judge was there pointing out the need for restraint in the amount of damages that should be awarded. (3.) The means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant’s conduct is relevant.’ Justice Cooke held that the facts of this case did not come within any of the above circumstances where exemplary damages would be justified. However, in the assessment of general damages, the Court took into account the disruption caused to the general day to day administration of the business due to the diversion of staff from their normal tasks, and while he deemed damages were not recoverable under either special or exemplary headings, he awarded €25,000 in general damages in this respect.

Finally, in respect of the claim for additional and conditional damages pursuant to s. 14 of the 2002 Act, Justice Cooke examined the question on the same basis as he addressed the issue at hearing (in aid of the Supreme Court in the event of an appeal) and found that an award of damages under s. 14 would have followed the same assessment of loss and compensatory damages set out above. He also held that punitive or exemplary damages would not have been appropriate for the purposes of s.14, in this instance. The Court noted that, unlike the cartel infringement, the conduct involved in an abuse of

dominance can arise innocently without realisation of the existence of the position of dominance. In this case, the Court indicated that insofar as it considered that there had been an abuse of a position of dominance, it was one which arose out of the statutory position of the Minister and was not the consequence of aggressive exploitation by a purely commercial undertaking of a position of market dominance.

It was important, in the view of the Court, to bear in mind that the Minister's position is not equivalent to that of a public authority under Article 106 TFEU. Rather, the Court had to strike a balance between the application of the competition rule in s. 5 and the commercial task assigned to the undertaking in question by the Oireachtas. Justice Cooke noted that in the 1968 Act certain objectives were to be pursued in the public interest, and it was found that in adopting the 2003 Order, the Minister erred as regards the scope of the power conferred in relation to the charges imposed at Rossaveel. However, the error was made in good faith and the steps taken for enforcement on foot of it were not undertaken maliciously or recklessly. Accordingly, Justice Cooke held that, had the Court been required to rule on an application for damages under s.14 of the 2002 Act, its approach to the measure of damages would have been the same as that adopted on the claim based on the general and special losses suffered.

5.3. Csilla Szabó (Budapest Metropolitan Court, Hungary), *Private Radio Broadcaster v. State-owned Hungarian radio company*

Judgment of the Hungarian Supreme Court No. Gfv.IX.30.280/2011/4

Facts

In Hungary, radio and television programme broadcasting was a state monopoly until our accession to the European Union on 1st May, 2004. According to the concession contract with the State, the plaintiff had the monopoly right in Hungary to broadcast all Hungarian radio and television programmes until accession to the EU.

The respondent is a Hungarian radio company (also state-owned). The parties entered into a 7 year long contract on 1st July, 2003. According to this contract, the plaintiff's obligation was to broadcast the radio programmes of the respondent on a certain frequency, and the respondent's obligation was to pay the fee. The parties settled the length of the broadcasting per week (264 hours) and agreed that this time could be amended by mutual consent.

The respondent notified the plaintiff that it was to decrease its weekly programme period from 264 hours to 35 hours, according to the decisions of its directorial board. The parties did not amend their written contract. The plaintiff reserved its capacity for the respondent's programming to the weekly time period negotiated in their contract and billed for the whole agreed fee. The respondent refused to pay it because it did not entirely take up the reserved broadcast time.

The Ruling of the First Instance Court

The plaintiff brought an action against the respondent and claimed the whole agreed broadcast fee. The respondent asked the court to reject the plaintiff's claim. It argued – amongst other things – that their broadcast contract was void because it breaks Section 21 of the Hungarian Competition Act (which is the same as Article 102 of the TFEU). According to the respondent, some terms of the contract allowed the plaintiff to abuse its dominant position in the market. When they entered into the agreement, the plaintiff had the concession for the state monopoly of broadcasting radio programmes, so there is no question that it had a dominant position in the radio programme broadcasting market. The plaintiff abused this position because it added a 'take or pay' clause to their contract, as the respondent had to pay the whole broadcast fee, even if it did not take the broadcast service because of the decrease in its programming time. Moreover, the contract's 7 year term leads to the result that the contract remains exclusive after the termination of the legal monopoly. During this long period there is no possibility for the respondent to decrease the service and the fee, or to dissolve the contract. As a result of this abusive behaviour, no possible competitors can enter the market, and the contracting party has no opportunity to amend the terms of the contract during the 7 year period or to dissolve it.

To the respondent's argumentation on anti-competitive behaviour by the abuse of its dominance, the plaintiff emphasised that its activity did not fall within the scope of the Competition Act because both the plaintiff and the respondent were state-owned companies, so their contract was the result of a state decision and not of free market behaviour.

The First Instance Court obliged the respondent to pay the fee. It did not accept the argumentation on the abuse of dominance. It held that the activity of a state monopoly does not fall within the scope of the Competition Act because the legal relationship of the parties had not been created as the result of the free market-based decision of those parties. Moreover, the 'take or pay' clause and the long term of the contract are reasonable terms only because the respondent is entitled to use the frequency

determined in the contract and the capacity for broadcasting on this frequency, which was configured according to the demands of the respondent, so the plaintiff could not purchase it from another undertaking.

The Ruling of the Appeal Court

The respondent appealed against this decision. The Appeal Court did not amend the decision of the First Instance, but examined the anti-competitive argument on its merits. It held that the existence of a legal monopoly does not exclude the behaviour of the monopoly from the scope of the Competition Act. There is no question that the plaintiff had the dominant position in the relevant analogue radio broadcasting market. Until 1st May, 2004, it was a state-owned company which had a legal monopoly. Although the monopoly was terminated less than a year after the contract had been signed, there was no real chance for any other undertaking to compete after 1st May, 2004, because of the extremely high costs of the investment. The question is whether the plaintiff abused its dominance in the market by applying the contract terms that are challenged.

As there were no other competitive broadcasting companies because of the legal monopoly, and later because of the high investment costs, the exclusivity of the contract caused no real disadvantage to the respondent because it was not the exclusivity term of the contract that restrained it from negotiating with any other company. The long term of the contract, which ensures the same conditions for the plaintiff after the termination of the legal monopoly, might be abusive, but in these special circumstances the Court found it reasonable. On one hand, the high costs of the investment that the plaintiff had paid to develop its capacity according to the demands of the respondent justified this provision; on the other hand, the respondent had a 7 years long obligation to the State to provide radio programmes on its frequency, so the long term of the contract served not only in the interest of the plaintiff, but also in the respondent's. The 'take or pay' term of the contract is not absolute. It is true that there is no chance to decrease the fee automatically when the programming time of the respondent decreases, but the contract could be amended by mutual consent and it can be dissolved when the economic or legal conditions change in their essence. Applying these terms cannot therefore be found to be abusive.

The Supreme Court of Hungary approved the decision of the Appeal Court.

Comment

The question of abusive dominance in a monopolistic market must quite often be argued in the ex-socialist Eastern European countries. These countries had ended the former legal monopolies in most fields of the economy, but the effects of a former legal monopoly still survive its existence and – without state intervention – they actually restrict new competitors from entering the market and thus sustain a monopolistic market.

The other important point in this case is that it shows how parties can use competition law argumentation in a general obligation law case as, in this case, the claim was to oblige the respondent to pay the contractual fee, and the counterclaim was that the contract was not void, so the fee did not have to be paid.

5.4. Dimitrios Titsias (Larissa Court of First Instance, Greece), *Greek medicines distributor v. GlaxoSmithKline*

Judgment of the Greek Supreme Court No. 1286/2011

Introduction

The appellant in the proceedings before the Court of Appeal (the plaintiff in the proceedings before the Court of First Instance), made a request and took the case to the Supreme Court on the grounds that the Court of Appeal interpreted and wrongly implemented Article 82 EC and Article 2 of Greek Law 703/1977 on the control of monopolies and oligopolies and the protection of free competition (which essentially corresponds to the provisions of Article 82 EC, now 102 TFEU) and rejected the claims.

Facts

The facts which the Court of Appeal accepted as proven (and which cannot be challenged before the Supreme Court) are the following: The defendant is the Greek subsidiary of GlaxoSmithKline plc, a pharmaceuticals research and manufacturing company that is established in the United Kingdom (GSK plc). GSK AEVE imports, warehouses and distributes the pharmaceutical products of the GSK group (GSK) in Greece. As such, it holds the marketing authorisation in Greece, *inter alia*, for the medicinal products Imigran, Lamictal and Serevent for the treatment, respectively, of migraine, epilepsy and asthma ('the medicinal products in dispute'), which are available in Greece only on prescription. As far as these medicinal products are concerned, the defendant holds a dominant position in the national market. For a number of years, the plaintiff had bought those medicinal products in all their forms from GSK AEVE in order to distribute them, both on the Greek market and in other Member States. From 1997, the pricing of these imported products was at the lowest sales price to the wholesalers within the European Union, which meant, as a consequence, that in Greece these products were cheaper in comparison to other European Countries (especially the United Kingdom), where the plaintiff could export them at a higher price and thus make a higher profit percentage. Towards the end of October, 2000, GSK AEVE altered its system of distribution in the Greek market, citing a shortage, for which it denied responsibility, of those medicines. From 6th November, 2000, it stopped meeting the orders of the plaintiff for the medicinal products in dispute and began itself to distribute those products to Greek hospitals and pharmacies through the company Farmacenter AE (Farmacenter). In February, 2001, taking the view that the supply of medicines on the Greek market had to some extent normalised and that stocks at hospitals and pharmacies had been reconstituted, GSK AEVE started once more to supply the plaintiff and other wholesalers with limited quantities of the medicinal products in dispute and, shortly afterwards, brought its cooperation with Farmacenter to an end. The Appellate Court ruled that the refusal of GSK AEVE to supply the requested quantities of medicinal products to the plaintiff did not constitute an abuse. Firstly, it was not a case of an actual refusal in as much as, apart from a period of a few weeks between November, 2000, and February, 2001, GSK AEVE was always prepared to supply the wholesalers with sufficient quantities. Secondly, it did not put the wholesalers at the risk of being eliminated from the market, since its supplies enabled them to cover all the requirements of the Greek market, and even requirements that went beyond those of that market. According to the Appellate Court, the decisive factors for the question as to whether the conduct of a company that refuses to supply certain goods is abusive, depends on the economic and regulatory context of the situation in question. In the case of a supply restriction in medicinal products in order to limit parallel trade, it is thus necessary to take into account the omnipresent regulation of prices and distribution in the pharmaceuticals sector, the negative consequences of an unlimited parallel trade upon the investments of pharmaceuticals companies in the field of research and

development, and the minimal benefit of that trade for the final consumers of those products. After consideration of all these factors, the Appellate Court came to the conclusion that the refusal by the defendant (an undertaking holding a dominant position) to supply medicinal products to retailers with the aim of restricting parallel trade does not constitute, *in concreto*, an abuse of a dominant position within the meaning of Article 82 EC. On this basis, it reaffirmed the decision of the Court of First Instance, which had also rejected the plaintiff's complaint, who sought, on one hand, an order that the products continue to be supplied in quantities corresponding to the monthly average supplied by GSK to them between 1st January and 31st October, 2000, and, on the other hand, compensation in respect of the damage caused and its loss of profits.

The Ruling of the Supreme Court

In its decision, the Supreme Court first provided an interpretation of Article 82 EC (based on the established case-law of the European Court of Justice): Article 82 EC prohibits any abuse, by one or more undertakings, of a dominant position within the Common Market, or in a substantial part of it, as being incompatible with the Common Market in so far as it may affect trade between Member States. According to point (b) of the second paragraph of that Article, such abuse may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers. The refusal by an undertaking occupying a dominant position in the market to supply a given product to meet the orders of an existing customer constitutes an abuse of that dominant position under Article 82 EC where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor (see, *United Brands and United Brands Continental v Commission* [1978] ECR 207, paragraph 75, 182 and 183 and *C-95/ 2004 P British Airways v Commission*, paragraph 69). With regard to a refusal by an undertaking to deliver its products to wholesalers in one Member State who export those products to other Member States, such an effect on competition may exist not only if the refusal impedes the activities of those wholesalers in that first Member State but, equally, if it leads to the elimination of effective competition from them in the distribution of the products on the markets of the other Member States. (Case 26/75 *General Motors Continental v Commission*, paragraph 12). Of course, only the pursuit of an undertaking occupying a dominant position in the market to minimise the damage caused to that undertaking by parallel exports, in the case that a customer, in addition to supplying the market in that Member State, exports part of the quantities ordered to other Member States at higher prices, seeking to incorporate the difference from the higher price offered to the other Member State, does not constitute sufficient reason to justify the decision of the dominant undertaking to cease to honour the ordinary orders (orders in the quantities which have existed so far). Such a refusal excludes an alternative source of supply to buyers of medicinal products in those latter States and therefore has an effect on competition. Even in Member States where the prices of medicines are subject to State regulation, parallel trade is liable to exert pressure on prices and, consequently, to create financial benefits not only for social health insurance funds but, equally, for the patients concerned, for whom the proportion of the price of medicines for which they are responsible will be lower. Article 82 EC must therefore be interpreted as meaning that an undertaking occupying a dominant position in the relevant market for medicinal products which, in order to put a stop to parallel exports carried out by certain wholesalers from one Member State to other Member States, refuses to meet ordinary orders from those wholesalers, is abusing its dominant position since the national markets are isolated (artificially partitioned) and this leads to the elimination of effective competition. In that respect, it is sufficient to state that, in order to appraise whether the refusal by a pharmaceuticals company to supply wholesalers involved in parallel exports constitutes a reasonable and proportionate measure in relation to the threat that those exports represent to its legitimate commercial interests and it must be ascertained whether the orders of the wholesalers are out of the ordinary, destined to cover parallel exports, because the refusal to supply is then justifiable and not abusive. Otherwise, the refusal to meet ordinary orders from those wholesalers must be regarded as an abuse of the dominant position occupied by that undertaking, which is liable to compensate (Case C-468/06 and Case C- 478/06 paragraph 34-78).

Further, the Supreme Court ruled that the Court of Appeal misinterpreted Article 82 EC because it came to the conclusion that the defendant's decision to deliver its products, from 1.9.2001 until 31.12.2002, only in quantities of medicines that were equivalent to national consumption, and its refusal to meet more orders for medicines (which were indeed to be re-exported to other Member States) was not abusive, although the orders in the crucial period were ordinary in the light of the previous business relations between the defendant and the plaintiff.

Comment

In the case above, the Greek Supreme Court for Civil and Criminal Cases (*Areios Pagos*) deals with some fundamental questions of Community competition law relating to the abuse of a dominant position, which is prohibited by Article 82 EC, and parallel imports of medicinal products from the Hellenic Republic to other Member States, where reimbursement of the price paid for medicinal products dispensed under prescription is appreciably higher than it is in Greece. More specifically, the question was whether the refusal by a pharmaceuticals company occupying a dominant position in the national distribution market for certain medicinal products, to meet the orders of a wholesaler is abusive and, in such a case, whether this refusal is justifiable by the fact that the undertaking was seeking to prevent re-export to other European countries, in particular, to Germany and the United Kingdom.

This was not the first time that this issue had been brought before a Greek civil court. In fact, a year earlier, the decision of the Appellate Court had been set out (Decision Number 7770/2007). The same Court (with different judges judging a similar case) had addressed a preliminary ruling to the Court of Justice (Decision 1565/2006). By its judgment of 16th September, 2008, in Joined Cases: C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proïonton*, formerly *Glaxowellcome AEEVE*, the European Court had ruled that: 'Article 82 EC must be interpreted as meaning that an undertaking occupying a dominant position in the relevant market for medicinal products which, in order to put a stop to parallel exports carried out by certain wholesalers from one Member State to other Member States, refuses to meet ordinary orders from those wholesalers, is abusing its dominant position. It is for the National Court to ascertain whether the orders are ordinary in the light of both the size of those orders in relation to the requirements of the market in the first Member State and the previous business relations between that undertaking and the wholesalers concerned'.

When the case on which we are commenting was brought before the Supreme Court, this Court used the decision of the ECJ in order to say that the Appellate Court failed to interpret and implement Article 82 EC correctly. To do so, as we have seen, the Supreme Court ruled that the aim of the defendant to counter the threat to its own commercial interests that were potentially posed by the activities of the plaintiff, and who wished to be supplied in Greece with significant quantities of products that were essentially destined for parallel export, was not pursued in a reasonable and proportionate way (and therefore was unjustifiable) because 'the orders in the crucial period were ordinary in the light of the previous business relations between the defendant and the plaintiff'.

Are these explanations sufficient according to the above-mentioned decision of the ECJ? The European Court implemented the rule of reason by using two criteria (for the National Court to ascertain whether the orders are ordinary), one more objective (relating to the requirements of the market in the first Member State), and one more subjective (the previous business relations between that undertaking and the wholesalers concerned), but the Greek Supreme Court seems to state (at least in this case) that the fulfillment of the one is enough. Is this the case, especially when the ECJ seems to demand (using 'and') the fulfillment of both criteria? We find it more logical that the meeting of both conditions is not an absolute one. The European Court has given useful directions to national courts in their effort to implement the rule of reason with flexibility and according to the needs and characteristics of the case (within the economic and legal context in which it arises). For example, one

cannot exclude, in a case of rising demand, that the dominant undertaking should exceed the ordinary orders (except when there is an objective reason for refusal) or, on the other hand, when there is a reduction in demand, that it could provide less than the ordinary orders. The main issue is to prevent an undertaking in a dominant position from hindering parallel export by forcing the wholesaler to put a stop to it.

5.5. Mira Raycheva (Supreme Administrative Court, Bulgaria), *Vitosha Ski AD and others v. Bulgarian Competition Authority*

Decision No. 1338/26.10.2010 of the Bulgarian Commission for Protection of Competition

Decision No. 11 098/10.08.2011 on Case No. 14674/10 of the Supreme Administrative Court of Bulgaria (First Instance Court)

Decision No. 718/13.01.2012 on Case No. 13238/11 of the Supreme Administrative Court of Bulgaria (Second Instance Court)

Facts

The capital of Bulgaria, Sofia, is situated at the foot of Vitosha Mountain. This mountain is one of the oldest winter resorts in Bulgaria and has been a candidate for host city of the Winter Olympics several times. As it is very close to the city, it is a favourite skiing destination for the inhabitants of Sofia.

Vitosha has the status of a national nature park and all the sport facilities built there are either public or municipal property. By virtue of a long term concession agreement, all the sports facilities in the national park are granted to Vitosha Ski AD (a joint-stock company). This company operates 92.74% of the skiing infrastructure and 4.94% of the equipment, and they are operated respectively by Machirski Sport and the state.

The Vitosha Winter Centre offers practical ski training for children and adults. These activities have been carried out recently by several companies. After 2007, such activity has also been carried out by Vitosha Ski Schools Ltd., a company whose one-man proprietor is Vitosha Ski AD.

During the 2009/2010 winter season, the ski instructors working for Vitosha Ski Schools Ltd. were reappointed by Vitosha Ski AD by virtue of labour contracts. As a consequence, they were exempted from paying for the right to use the infrastructure (e.g., the need to buy ski lift passes).

During the same winter season, Vitosha Ski AD offered a 20% reduction in the price of the season ticket that entitled clients to use the ski hire facilities and specialised ski training offered by Vitosha Ski Schools Ltd. At the same time, Vitosha Ski AD offered a price for a season's use of the ski equipment as follows: By clients, 590 BGN, and by ski trainers, 2,000 BGN, whilst the ski trainers from the same company could use it free-of-charge.

As a result of the reductions mentioned above, the price of a five-day ski training course, including the hire of ski equipment and the price of the season ticket, was 20% to 30% lower than the ones offered by other companies for identical training at the same ski centre.

In the period 2008-2011, the market share of Vitosha Ski Schools Ltd. put the company in third place amongst all of the companies providing ski training services. The first and second place were taken by two other companies that later became part of the Vitosha Ski and Snow-Board Schools Association (hereinafter referred to as the 'Association').

The Decision of the Bulgarian Competition Authority

In 2011, some of the companies providing ski training services to the Vitosha Mountain merged into the above mentioned Association and, together with the Sport and Tourist Company 'Moten' (not part of the Association itself), appealed directly to the Commission for the Protection of Competition (the

‘Commission’) by lodging a complaint against Vitosha Ski AD on the basis of a suspected violation of Art. 21, paras. 1, 3, 4 and 5 of the Protection of Competition Act, the abuse of a dominant position.

The particular complaints were based on statements for:

1. Laying down unfair trading conditions (para. 1);
2. Applying dissimilar conditions to equivalent transactions with certain trading parties, thereby placing them at a competitive disadvantage (para. 3);
3. Making the conclusion of contracts conditional upon acceptance by the other parties of supplementary obligations or the conclusion of additional contracts which, by their nature or according to normal commercial usage, have no connection with the subject of the main contract or its execution thereof (para. 4);
4. Refusing without a valid reason to deliver any goods or to provide any service to existing or potential customers, with the purpose of hindering the business operations of such customers (para. 5).

In its Decision, the Commission holds as follows:

Vitosha Ski AD has a dominant position in the use of the ski infrastructure. What is essential in this case is that the sports facilities have been built in a national park and none of the companies has either the legal or factual possibility to build and use such facilities. The Commission also assesses the fact that the access to the above-mentioned facilities is of an exceptional importance when providing the ski training service. According to the Commission, the impossibility of using the infrastructure leads to an impossibility to develop any commercial activity. The Commission also accepts that the price of a season ticket for a ski instructor is proportionate to the price of a similar ticket in the other main Bulgarian ski resorts. The way it is calculated does not present an infringement of competition law. According to the Commission’s decision, the utilisation of the equipment and the use of the ski training service that is offered by a company managing all the sports facilities, is entirely granted at the free will of the consumer. As an argument in maintenance of this opinion, the Commission points out that the market share of Vitosha Ski Schools Ltd. is not considerable in comparison with those of the other participants in the relevant market.

The First Ruling of the Supreme Administrative Court

The Association and the Moten Company appealed the Commission's decision before a three-member panel of the Supreme Administrative Court. In its judgment, the Court partially reversed the Commission's decision, ruling that the way Vitosha Ski AD set the particular price for a season ticket for a ski instructor should situate it under the incidence of Art. 21, para. 1 of the Protection of Competition Act. The Court stated that there is no substantial difference between the expenses incurred by a ski instructor in order to use the sport facilities and those incurred by other consumers. The result is that the price of a season ticket is obviously higher than the price offered in other national ski centres.

The Supreme Administrative Court considered the other complaints against the Commission's decision and decided to leave the decision as it stood. The Court pointed out that although the parties were competitors, the requirement that only the ski instructors working for the Association and for Moten have to pay for season tickets does not put them at a competitive disadvantage. An additional argument for this is the market share of the parties that is at issue. According to the Court, although Vitosha Ski AD had bound the use of the equipment to the purchase of another service, this cannot influence the free will of consumers. The First Instance Court accepted also that there is neither a refusal of access to substantial equipment (sport facilities), nor an ungrounded (ill-founded) high price for an ascending service in a vertically connected market. The Court found the reason for this in the opportunity that had been given to the complainants to use the sports facilities under certain circumstances that are considered correspondent to the normal market.

With its judgment, the First-Instance Court partially overturned the Commission's decision and returned it to the Commission for delivery of a new decision in accordance with the instructions given for the analysis of the evidence on the alleged violation of Art. 21, para. 1 of the Protection of Competition Act.

The Second Ruling of the Supreme Administrative Court

An action for annulment was brought by all the parties concerned against the decision of the three-member panel of the Supreme Administrative Court before a five-member panel of the same Court. The parties disagreed with the Court's conclusions for presence, respectively for the lack of presence, of a violation of Art. 21 of the Protection of Competition Act.

The Highest Court Instance accepted that the First Instance Decision is substantially lawful as to the conclusion of the presence of unfair trading conditions as a result of the higher price of the season ticket for professional ski instructors. According to the Court, it is economically unjustified that the price of the service should be different for a ski instructor and for an ordinary consumer.

The Supreme Administrative Court Second Instance further elaborated that Vitosha Ski AD is an undertaking with a dominant position and, as such, had laid down different conditions for the participants in the relevant market. The Court pointed out that this constituted price discrimination due to the fact that, for ski instructors, buying a season ticket is absolutely obligatory for the realisation of ski training services. The Court offered as an argument that the above-mentioned practice had led to a substantial price advantage for Vitosha Ski AD and had resulted in unequal behaviour for competitors.

According to the Court's ruling, by its actions, Vitosha Ski AD had bound the purchase of a season ticket by the consumer with the use of supplementary services that were offered by the same company, such as ski hire and ski training. In its judgment, the Court pointed out that the price concession offered (from 15% to 20%) of the price of the season ticket, had led to a difference in the price of up to 30% in comparison with the similar 'ski training' service offered by Vitosha Ski Schools Ltd. and the other companies that are members of the Association. This price disadvantage was found to be substantial: it might be a threat to the normal development of the market and could be considered to be a prerequisite for the falling away of participants from the vertical market.

The Second Instance Court shared the final conclusion of the First Instance ruling that there was no infringement, based on the lack of access to service. The Court elaborated the thesis that there would not be access to service at any time when an excessive price for the service is offered. In all cases, this would constitute an abuse of a dominant market position.

On these grounds, the appealed judgment was enforced in the part relating to the established violation of Art. 21, para. 1 of the Protection of Competition Act, as well as regarding the lack of a violation under para. 5 of the same Act. In the part relating to the alleged violation of Art. 21, paras. 3 and 4, the Commission for the Protection of Competition's decision and the upholding of the judgment of the Supreme Administrative Court, are repealed. The judgment was returned for the delivery of a new judgment in accordance with the given instructions.

Comment

This case is a good example of the fact that competition law can provoke many contradictory theses - the one of the National Competition Authority, that of the First Instance Court, and that of the Highest Court Instance. I think that this case is an illustration that the abuses of dominant market position could be of a completely different nature, and therefore they should be examined with regard to the protection of the normal functioning of the market in cases where similar services are provided by a company - a natural monopolist in a sphere that is closely related with the one offered..

6. Competition Distortions and Unfair Commercial Practices in Regulated Industries

6.1. Madis Ernitis (Tartu District Court, Estonia), *Estonian Competition Authority v. Estonian Post*

Timeline of the Judicial Proceedings

- 04.08.2004 – The Estonian Competition Authority (ECA) begins with an analysis of the competition situation in the direct mail market.
- 08.02.2007 – ECA's decision No. 05/05 states that Estonian Post (EP) has violated § 16 No. 3 and 4 of the Competition Act (CA) during the period
- 26.11.2004–31.12.2006, Estonian Post has committed a misdemeanor, according to § 735 CA, and shall be punished with a fine of 15 000 Estonian kroons (appr.1,000 €).
- 25.02.2007 – The EP files an action against the ECA's decision in the Harju County Court.
- 11.05.2007 – The County Court upholds in its decision No. 4-07-852, the action annuls the ECA's decision No. 05/05 and orders the termination of the proceedings.
- 06.06.2007 – The ECA files an appeal against the County Court's decision No. 4-07-852.
- 05.12.2007 – The Estonian Supreme Court, in its decision No. 3-1-1-64-07, partially allows the appeal and replaces the reasoning of the County Court's decision No. 4-07-852. However, it leaves the operative part of the County Court's decision in the relevant part unchanged.

Relevant Law

§ 16 CA. Abuse of dominant position

Any direct or indirect abuse by an undertaking or several undertakings of the dominant position in the goods market is prohibited, including: [...]

- 3) offering or applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing some of them at a competitive disadvantage;
- 4) entering into an agreement subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such agreement;

§ 735 CA. Abuse of dominant position

- (1) A member of the management board, of a body substituting for the management board, or of the supervisory board of a legal person, who establishes unfair trading conditions, or who limits production, services, goods market, technical development or investments to the prejudice of buyers, or engages in activities involving abuse of the dominant position in the market shall be punished by a fine of up to 300 fine units or by detention.
- (2) The same act, if committed by a legal person, is punishable by a fine of up to 500,000 kroons.

The Decision of the Estonian Competition Authority

The ECA made two major allegations against the EP:

According to the first allegation, an unequal treatment of different large direct mail clients occurred. It was established that the EP had, according to an internal document, divided large clients into two groups: advertising clients and mail order clients. The terms and conditions of the contracts were identical because a standard contract was used. The ECA made an allegation that the EP applied

different discount prices to the large direct mail clients for the same services at equal volumes. They also added that the discounts varied even between the two types of clients.

The second allegation stated that an additional contractual obligation was set on the clients: A client would obtain 100% discount only if the services of the EP were used exclusively for direct mail (a loyalty discount).

The Ruling of Harju County Court

The County Court upheld the action, annulled the ECA's decision and ordered the termination of the proceedings. The County Court stated that the ECA had not analysed and proved the assumption that the advertising clients and mail order clients were equal and used the same services at equal volumes. It argued that the advertising clients bought only direct mail services, whereas the mail order clients additionally bought the parcel sending service. The County Court also established that the EP did not violate the CA because the clients had negotiated and concluded contracts with the EP, agreeing to the full price offered. Furthermore, the County Court found, in respect of the loyalty discount, that the ECA had not clarified whether the so-called loyalty discount has put any undertaking into a disadvantageous position at all, and, if so, how?

The third major argument of the Court consisted in the inability of the ECA to discover, during proceedings that lasted over two years, which body or board member had committed the misdemeanor.

The Ruling of the Supreme Court

The Supreme Court partially allowed the appeal and replaced the reasoning of the County Court's decision. However, it left the operative part of the County Court's decision in the relevant part unchanged.

The Supreme Court found, firstly, that the law does not presuppose the existence of a consequence (restriction or prevention of the competition). Moreover, it declares behaviour that typically distorts the functioning of the competition deriving from the interests of free entrepreneurship punishable. It is based on the prohibition of the abstract endangering of competition (No. 8.1).

The Supreme Court continued with the argument that the defence's assertion that the mail order clients obtaining additional further services does not justify different prices and discounts for the same services. Furthermore, EP's clients were discriminated against within the two groups, because some of the advertising clients obtained a smaller discount than others. One of the clients who obtained a smaller discount was a competitor of the EP in the direct mail market. The Supreme Court stated that the ECA had correctly found that the EP had violated § 16 No. 3 CA (No. 8.2).

The Supreme Court proceeded, ruling that the EP is in the dominant position in the direct mail market. Such an undertaking shall be prohibited from binding clients to an obligation to supply all, or most, of the need, exclusively by the undertaking that is in the dominant position. This includes the prohibition against applying loyalty discounts or bonuses. It is a behaviour that excludes competitors and it may have the effect of closing off the market to competitors. The Supreme Court refers to the *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76 [1979] ECR 461, No. 89; *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, Case T-203/01 [2003] ECR II-4071, No. 56-57, 65) (No. 8.3).

Finally, the Supreme Court argued that the County Court's decision to terminate the proceedings was correct, since the EP had committed no misdemeanor. During the period 26.11.2004–31.12.2006 the old wording of § 735 para.1 CA was applicable. According to that norm, a legal entity was, then, responsible for the misdemeanor only if an abuse of a member of the management board, of a body

substituting for the management board or the supervisory board, was previously ascertained. The ECA had not ascertained the name of a concrete person in the pre-trial proceedings (No. 10).

Comment

Since 15.03.2007, § 735 para. 1 CA has new wording: (1) A person who establishes unfair trading conditions, or who limits production, services, goods market, technical development or investments, or engages in activities involving abuse of the dominant position on the market by the enterprise shall be punished by a fine of up to 300 fine units or by detention.

The EP eliminated all alleged practices from 01.01.2007 onwards, but stayed unpunished. However, the Supreme Court stated explicitly that the EP had violated § 16 No. 3 CA and it could be concluded from the reasoning of the Supreme Court that there had also been a violation of § 16 No. 4 CA. Until now, this case is the leading precedent in Estonian Competition Law for identifying a distortion in competition.

6.2. Janis Neimanis (Supreme Court, Latvia), *Maxima Latvija and others v. Latvian Competition Authority*

Introduction

At the beginning of 2013, the Supreme Court considered three cases, which were consolidated so that legal matters affecting the abuse of a dominant position in retail trade were considered. Latvia is one of the few states where the prohibition of the abuse of a dominant position in retail trade is regulated by law.

Relevant Law

Section 13, part two of the Competition law provides that:

‘(2) A market participant or several market participants are in a dominant position in retail trade if, considering their buying power for a sufficient period of time and the suppliers’ dependency in the relevant market, they have the capacity of directly or indirectly applying or imposing unfair and unjustified provisions, conditions or payments upon suppliers and may hinder, restrict or distort competition in any relevant market in the territory of Latvia. Any market participant who is in a dominant position in retail trade is prohibited from abusing such a dominant position in the territory of Latvia. Abuse of a dominant position in retail trade occurs as:

1) application or imposition of unfair and unjustified provisions concerning return of products, unless the returned product is of poor quality or is a product, including a new product, unknown to the consumer, a delivery, or increase in the amount of delivery of which is initiated by the supplier;

2) application or imposition of unfair and unjustified payments, discounts for the delivery of products, the presence of the delivered product at a retail outlet, including for the placement of products on the shelves of shops, and for the promotion measures of the trade. Objectively justified payment for the promotion of a new product, unknown to the consumer, in the market shall not be considered as unfair and unjustified;

3) application or imposition of unfair and unjustified payments for entering into a contract, unless such payments are justified by the fact of entering into a contract with a new supplier, who therefore needs a special evaluation;

4) application or imposition of unfair and unjustified payments for the delivery of products to a soon to be opened retail outlet;

5) application or imposition of unfair and unjustifiably lengthy settlement periods for the delivered products. The settlement period for the delivered food products, the term of validity of which is no longer than 20 days, shall be unfair and unjustifiably lengthy, if it exceeds 30 days from the day of the delivery of products; and

6) application or imposition of unfair and unjustified fines for violating the provisions of a transaction’.

First Case

Overall, there are two market players in Latvia who occupy the dominant position in the retail trade supermarkets - Maxima and Rimi. There is a considerable purchasing power there.

In the first of three cases the Court considered the decision of the Competition Council, whereby SIA Maxima Latvija was held liable for an infringement of the earlier specified rules. In this case, on 1st October, 2008, SIA Maxima Latvija and the third person, SIA Siguldas Maiznieks, entered into a goods delivery contract, whereby the third person delivered pastry – cookie, biscuits, cakes, etc., to

Maxima. Pursuant to the contract provisions, the filer would pay for the foods delivered within a period of 60 days from the time of their delivery. For each day exceeding 30 days, Maxima had to pay interest on any outstanding payment for the purchase in accordance with the interest rate set per annum. In 2009, more than half of the goods produced were delivered directly to the filer by a third person.

By the decision of 13th January, 2011, the Competition Council recognises the contract provisions regarding the periods of accounts settlement for Maxima as an abuse of its dominant position in the retail trade. In the opinion of the Council, a fair and duly reasoned term, when the buyer should settle accounts for the products delivered, is the average time of the turnover of these goods in a particular retail trade chain, adding a term of up to 10 days thereto, which may be necessary to verify mutual accounts and to take other actions relating to accounts settlement.

The Court recognises that the shelf life of a cookie is more than 20 days, so the Competition law does not directly determine which term of accounts settlement would be unfair and unreasonably long. Simultaneously, the Court recognises that, similarly, the principle of specific liability to a market player which is in a dominant position in retail trade is applicable; but this principle of liability is focused on the dominant position in retail trade in the retailer's relationship with the dependent suppliers; *inter alia*, this is relative to the periods of accounts settlement. A market player which happens to be in the dominant position in a retail trade in its relationship with dependent suppliers is therefore obliged to apply this policy of accounts settlement, which is objectively justified.

Maxima's tactics of defence turned solely on stating that its action does not fall outside of the cases specified in the law. It refused to clarify why it requires 60 days from the date of goods delivery to settle accounts with the third person. So, the court recognises in Maxima's conduct an infringement of their dominant position in retail trade.

In this case, the Supreme Court did not initiate the cassation proceedings, as it was earlier confirmed that the exercising of market power without any objective necessity, i.e., in conditions which reasonably justify the conduct, price, or transaction provision of a market player, is malicious. The Supreme Court specified that, in the legislator's opinion, the application of an unreasonably long term of accounts settlement for the delivered goods has already been seen as an action that is turned against free competition; therefore, a separate statement is not necessary.

Second Case

SIA Rimi Latvia, in Latvia, established two retail trade chains with different formats – the chain of Rimi supermarkets, and the Supernetto food store chain, where Supernetto is positioned as the low cost purchase chain in opposition to Rimi supermarkets. AS Valmieras piens supplied its own dairy products to the logistic centre of Rimi Latvia. Products were distributed and delivered further from the logistic centre to the shop chains of both formats. Irrespective of which format of trading chain it is envisaged to further deliver the goods to, one order is delivered to the supplier on a monthly basis and the initial discount (the so-called volume discount) has already been set, based on the total amount of the delivery to both chains of shops. Goods delivered by the supplier to Rimi Latvia do not differ (in quality and other properties or parameters) whether Rimi Latvia further decides to distribute the goods to the Rimi chain of supermarkets or to the Supernetto chain of shops, or to both of them. After a regular month, Rimi Latvia issues an invoice to the supplier on the scope of the products sold through the Supernetto food store chain. The difference that has arisen between the prices of goods on consignment notes and the lower selling price in the Supernetto food stores is compensated to AS Valmieras piens by Rimi Latvia. Suppliers, as well as AS Valmieras piens, have never known in advance what the amount of compensation for goods delivered in the next month will be, as the distribution of goods to these shops (and respectively to the volume of supplies to the Supernetto food store chain) is unilaterally arranged by Rimi Latvija without any agreement with the supplier.

By the decision of the Competition Council of 30th November, 2010, it was stated that there was an infringement of the prohibition in Rimi Latvia's actions as determined by Section 13, part two, paragraph 2 of the Competition law.

Initially, the Court recognised the decision of the Competition Council to be illegitimate; however, the Supreme Court repealed it. The Supreme Court disagrees with the opinion of the Court that, in the viewed transaction, it is merely the unfortunate formulated nature of the transaction, as there is nothing to change if the supplier were to deliver Rimi Latvia's goods at two different prices. The Supreme Court specified that, by recognising Rimi Latvia's price for the goods delivered to the Supernetto food store chain as a being applicable as a special purchasing price, the Court has not taken into account that such a 'price' is applied retrospectively by Rimi Latvia, and that Rimi Latvia had already been applying the discount to the total amount of goods sold in the Rimi Latvija chain to amount to one volume.

It is essential that the Supreme Court gave an explanation in this case, whose interests protects Section 13, part two (*inter alia*, paragraph 2) of the Competition Law. The Court specified that, in order to apply the rules of the law, a consumer's interests is really an essential and actual condition and therefore the Competition Council was obliged to prove harm to the consumers.

The Supreme Court did not agree to this, as it was specified in the materials prepared in the due course of law, which envisage that the law will promote fair competition, more efficiently protecting (small and medium) companies (producers) against the unfair provisions of transactions. The Supreme Court specified that small and medium companies are distinguished (highlighted) in the annotation, as they are the first to suffer economically from the abuse of the retailer's dominance and, in its essence, the protection of the rules of law applies to all suppliers. The public interests are indirectly protected by the rules of law, thus providing for a variety of producers and goods and thereby the strength and development of the national economy.

Third Case

In the third case, the Supreme Court considered the temporary correctness of the protection decision. The Court imposed a ban on the execution of the Competition Council's decision, considering it to be obviously illegal. With the Council's decision, a general obligation on a considerable retailer, AS Drogas, was imposed but did not include unfair and unreasonable provisions in contracts concluded with suppliers relative to the return of goods, the application of discounts, the contractual provisions providing for unfair and unreasonable payments on the delivery of goods to the newly established retail trade point, which envisage unfair and unreasonable penal sanctions for the infringement of transaction terms and conditions.

The Court regards such an obligation to be too general and ambiguous for its addressee, as the Council should particularly specify all of the dependent suppliers, with whom contracts are to be amended.

The Supreme Court does not agree with the position of the Court, making reference to the practice of the European Commission and the Court of Justice. The Supreme Court recognises that the degree of particularisation of the obligation depends upon part of the motive for the decision. If the grounds of the obligation imposed on the addressee are extended in the grounds of the decision, it cannot plead the ambiguity specified in the determinable part of the decision (see comparative Judgment of the European Court of First Instance of 12th December, 2000, on Case No.T-128/98 Aéroports de Paris, Paragraph 83).

The Supreme Court stated that, in the comparative aspect that competition cases in the European Commission imposed, the general obligation of the decision on the addressees to stop actions causing harm to competition (see the European Commission's decision No. COMP/E-1/36 604 of 5th

December, 2001, Decision No. COMP/36.571/D-1 of 11th June, 2002), although this already follows from the rule of law. Such decisions have been recognised to be true in the case law of the Court of Justice of the European Union (see judgment of the European Union Court of Justice of 24th September, 2009, in Joined Cases No.C-125/07 P Lombard Club). Similarly, it is recognised that the European Commission can formulate the general obligation for addressees to refrain in future by stating that there was an infringement of law in the decision in a similar manner (see, for example, the Decision of the European Commission on Case No. 88/138/EEC Hilti of 22nd December, 1987, which was approved by a Judgment of the European Court of First Instance of 12th December, 1991, in Case No.T-30/89). The obligation to stop the activity may be imposed even if the addressee has already stopped such activity prior to the decision being pronounced, or if the competition supervisory authorities are not clearly aware of the same (see, comparatively, the Judgment in Case No. T-354/94 the Court of First Instance of the European Union, paragraph 99).

The Supreme Court recognises that, under the decision's obligation, the circle of suppliers has not been given in detail; so by this all suppliers of the filer in a relevant market are meant. It should be taken into account that the market is specified in the decision of the Competition Council and the suppliers are known to AS Drogas. In order to formulate the obligation, it is requested that each supplier in a relevant market, and its economic dependence upon the retailer, are evaluated if it is stated that the retailer is in a dominant position in retail trade in a relevant market and a certain structure of the market is exorbitant, and when Section 13, part two of the Competition Law, does not claim it.

In turn, the obligation imposed in the decision is construed in conjunction with the causation of the decision, wherein the particular provisions of the contract are extensively evaluated, as well as the actions of the filer relative to the return of goods, the application of discounts, the contractual provisions that provide for unfair and unreasonable payments on the delivery of goods to the newly established retail trade point and which envisage unfair and unreasonable penal sanctions for infringement of transaction terms and conditions. In this case, the uncertainty of the obligation is not stated.

Comment

Latvia is one of the few states where the prohibition of the abuse of a dominant position in retail trade is regulated by law. This is due to a significant concentration of market players and the use of the power to establish a relationship with suppliers.

Regulation of a dominant position in the retail trade is derived from the basic regulation on the use of a dominant position in the market. They have the basic principles; *inter alia*, the obligation to an objective justification of actions.

Regulation is directly turned to protect suppliers and, through them, the trade structure and consumers.

The operative part of the decision of the Competition supervisory authorities should always be read together with the reasons. The authority enjoys wide discretion in determining the measures or restrictions on the market players that are applicable. It is clear, taking into account the addressee's knowledge of its suppliers, that this may differ from an ordinary event by the issuing of an administrative act.

6.3. Agnieszka Pieńkowska (Myszków District Court), *Getin Noble Bank v. Polish Competition Authority*

Judgment of the Warsaw Regional Court issued on 26th February, 2013

Facts

By the decision of the 12th November, 2010, the Head of the Office for the Protection of Consumers and Fair Competition (UOKiK) declared unlawful the practices of the bank in automatically charging its customers for falling behind the deadline for the minimum debt payment into their credit card accounts, even though the bank was not performing any additional action that might justify extra running costs for the account, which is a breach of Article 3 of the Bill of 1993 on Fair Competition.

The Head of UOKiK declared unlawful the bank's inclusion of a clause in the terms of the contract for their credit cards, where the clause says that the customer is liable to pay a flat charge of 39zl (around 10 Euros) for falling behind the deadline for payments into their account.

Under Article 479 – 45 of the Civil Law Procedure, the clause was an abuse of Polish law and it was thus forbidden.

The Head of UOKiK, referring to Article 106, items 1 – 4, of the Bill of 1993 on Fair Competition, imposed on the Getin Noble Bank S.A., Warsaw, a fine to be paid to the state budget, of 1,959,044zl (500,000 Euros).

The Getin Noble Bank filed an appeal against the decision, stating that the clause in the bank's contract terms regarding the payment of a fine of 10 Euros for falling behind the deadline is not an abuse of the law, specified in Article 479 – 45 of the Civil Law Procedure.

According to the claimant – the Getin Noble Bank, the fine imposed was not justified, and therefore an appeal against that decision was filed or, alternatively, a request to have the fine lowered.

The Regional Court in Warsaw established the *status quo* of the case. According to paragraph 12, item 8 of the contract terms that the bank signed with its clients, which says: 'in the case of falling behind with the minimum debt payment into the credit card, the bank will charge the credit card holder an amount of money specified in the table of running cost fees, including also other fees'.

The table of credit card and credit fees created by the Getin Bank S.A. says that the fee for falling behind with a payment is 39 zl (10 Euros).

As of the 1st March, 2009, the fee was automatically changed to 50 zl (12.5 Euros).

On 22nd July, 2009, a new fee of 60 zl (15 Euros) was introduced by the bank for any case where the bank's employee or a field debt collector visited the credit card's holder's house, and another fee was introduced for sending a debt reminder letter to the holder – the fee was 30 zl (7.5 Euros), and then another fee for a debt reminder phone call, the fee being 25 zl (6 Euros), as well as a text message reminder fee of 10 zl (2.5 Euros).

The information about the new fees was sent to the credit card holders as part of their monthly bank account notifications. The customers were informed that they could refuse to agree to the new terms by sending the bank a written resignation notice within the following 30 days. However, if a customer did send the refusal, that would automatically cancel the credit card contract which, in turn, imposed on the holder the need to pay to the bank the whole debt outstanding on the credit card within those 30 days.

The attorney for the Getin Bank, at the hearing of 15th February, 2013, stated that other banks also used this practice, yet they had not been fined, but had merely been obliged to terminate the practice.

The attorney presented the obligations that had been imposed on other banks by the head of UOKiK, referring to a similar *status quo* to the present case, but where no fines had been imposed on the perpetrators.

The defendant applied for the evidence presented by the bank's attorney to be dismissed, as it was filed after the evidence filing deadline, and all the decisions of the head of UOKiK are published on the website of the Office.

The Ruling of the Warsaw Regional Court

The Court dismissed the evidence presented by the Bank. The Regional Court established that the appeal was unsubstantiated, and the decision by the Head of UOKiK remains in place.

The practices of the Claimant breached Article 3 of the Bill of 1993 on Fair Competition, according to which it is a case of unfair competition if the practices are unlawful or against decent conduct, if those pose a threat to, or affect, the customer's financial status. In this particular case, it was decent conduct that had been breached.

It was acceptable to impose fees based on work done by the bank's employees; work like letters sent to the customers, e-mails written and sent, phone calls made and text messages sent, while it was not acceptable to impose fees that were unsubstantiated by the bank's employees' work, of 50zł.

It is easy to imagine a situation where the customer makes a payment into his credit card account with a slight delay, and yet the fee for falling behind with it will be imposed without any actual work that justifies this being done by the bank's employees. Such a practice is nothing other than pure gain for the bank, money for doing nothing, and the customer is already paying extra interest for falling behind with the payments, which is already in itself compensation paid to the bank.

The practice, which is against decent conduct, affected the class interest of the customers, as it could be applied to any of the bank's customers. The Court also established that the clause regarding the automatic charging of the customer with an extra fee, in a case where they fell behind with the payment, is an abuse of the law, breaching Articles 479 – 45 of Civil Procedure.

The fact that other banks performing similar practices had not been fined, and had merely been obliged to terminate these practices, could not be allowed as evidence to be used against the decision by the Head of UOKiK.

According to the Court, the fine imposed was adequate to the bank's malpractice.

With that situation in place, the Court dismissed the appeal and charged the Claimant with the costs for court procedures.

Comment

In my opinion, the ruling by the Regional Court (Competition and Consumer Protection) is fully justified and also clearly stated. In a situation where the bank can impose additional fees and penalties on its customers and the customers themselves are in no position to demand the same of the bank, it is only just, and substantiated by the law and the system of justice, that the Court should be strict and inclined towards the benefit of the customer.

6.4. Yulia Todorova (Sofia Regional Court, Bulgaria), *I.B. AD v. Bulgarian Telecommunications Company EAD*

Judgment No. 285 of 8th April, 2009, Sofia Appellate Court, Civil College, Fifth Bench, Civil Case No. 2039 on the docket for 2008.

Facts

Company I.B. AD has appealed the First-Instance judgment of the Sofia City Court, Commercial Division, VI-5 panel, delivered on 8th July, 2008, on Civil Case No. 1582/2004, whereby the Court has dismissed the claim of the company, claimed partially against the Bulgarian Telecommunications Company EAD, for the sum of BGN 20,000. This sum represents compensation claimed for material damage /lost profits/ suffered as a result of the violation of the Protection of Competition Act. The plaintiff requests a reversal of the appealed judgment and the granting of the partial claim.

The defendant -- the Bulgarian Telecommunications Company EAD -- challenges the appeal. The written notes of the defendant set out detailed arguments stating that there had been no unlawful behaviour towards the plaintiff. The defendant argues that the damage has not been proven and there is no causality between I.B. AD's drop in turnover and the actions of the Bulgarian Telecommunications Company EAD.

The Ruling of the Sofia Appellate Court

In the complaint and the specification of the claim made by written application on 7th March, 2005, the plaintiff states that the unlawful behaviour of the Bulgarian Telecommunications Company EAD was established by the resolution of the Commission for the Protection of Competition, which has taken effect, and the damage suffered by the plaintiff consists of:

1. Lost profits from terminated agreements with clients for the 'dial-up Internet access' service;
2. Lost profits from the sale of 'dial-up Internet access' cards;
3. Lost profits from the total volume of 'dial-up Internet access' services;
4. Lost profits from traffic purchased by the plaintiff;
5. Lost profits are claimed between 2000 and 2004, inclusive. The plaintiff states that they total BGN 12,000,000, yet it has lodged only a partial claim for BGN 20,000.

The Preliminary Agreement for access and connection that was signed between I.B. AD and the Bulgarian Telecommunications Company EAD on 17th June, 2002, was produced at the First-Instance Court, whereby the Bulgarian Telecommunications Company EAD agreed to provide paid and timely access to, and connection of ,the operator I.B. AD's public network for data transmission with the public fixed telephone network of the Bulgarian Telecommunication Company EAD, so that the users of this network could make calls to the operator using the national number, 0134400.

The Sofia Appellate Court has accepted the conclusions of expert witness opinion that established the following: in 2000, the number of subscribers to the Bulgarian Telecommunications Company EAD for the 'dial-up Internet access' service was 5,515, followed by a steady decline in the next four years, dropping to 1,231 in 2004. The revenue of the Bulgarian Telecommunications Company EAD from this service peaked in 2000, at BGN 343,524, dropping to BGN 232,147 in 2004.

I.B. AD's figures for the same period are as follows: clients for the 'dial-up Internet access' service in 2000 were 1,730, growing to 2,955 in 2002, after which the numbers gradually declined to 1,759 in

2004. The revenue drop from these clients, however, is long-lasting and significant, starting from BGN 865,405 in 2000, and plummeting to BGN 3,252.15 in 2004.

The first expert witness opinion ordered by the Sofia City Court showed that the ‘dial-up Internet access’ service is implemented technically through the physical environment of a fixed telephone network, of which there was only one in Bulgaria, owned by the Bulgarian Telecommunications Company EAD, and which was operated by special devices /telephone/modems.

Resolution No. 156 of 21st December, 2000, and Resolution No. 78 of 22nd May, 2003, of the Commission for the Protection of Competition were produced to the Sofia City Court, as well as Judgment No. 7155 of 16th July, 2002, of the Supreme Administrative Court, Fifth Division, delivered on Administrative Case No. 1742/2001 and Judgment No. 11897 of 20th December, 2002, of the Supreme Administrative Court – Five-Member Bench, delivered on Administrative Case No. 8902/2002, show that by virtue of the bringing into force of a Court Instrument, it was found that the Bulgarian Telecommunications Company EAD had violated Art.18, item 1, of the Protection of Competition Act. The violation is an abuse of dominant position in the market for the ‘access to Internet via the fixed telephone network’ service, whereby the Bulgarian Telecommunications Company EAD, being the only participant in the market for this service, enjoys more favourable conditions /by dial-up access via the single code 0134100, than I.B. AD. In its Resolution of 22nd May, 2003, the Commission for the Protection of Competition holds that ‘by offering to a part of its clients more favourable conditions for the use of the whole service, ‘access to Internet via the fixed telephone network’, due to the possibility of offering more favourable conditions for use of the first element of this service /ordinary telephone service/ and by also refusing to offer these conditions /with use of the first element/ to the clients of the plaintiff, the telecommunications company imposes ‘unfair commercial conditions’ within the meaning of Art. 18, item 1, of the Protection of Competition Act. The Bulgarian Telecommunication Company EAD is obliged to offer to its competitors the same commercial conditions for the whole service described /the given implementation of the first element thereof/, which it guarantees for itself. The imposition of unfair commercial conditions is related to the fact that the Bulgarian Telecommunication Company EAD binds the potential provision of the single code, 013400, to other Internet service providers for the use of Internet traffic purchased from the Bulgarian Telecommunications Company EAD, i.e., it forces all Internet service providers to become intermediaries between the company and the end users of the service ‘access to Internet via the fixed telephone network’.

The Sofia Appellate Court held that the defendant, the Bulgarian Telecommunications Company EAD, behaved unlawfully. The violation of the Protection of Competition Act conditions the right of the plaintiff, in its capacity as a party affected by the violation of the Protection of Competition Act, to lay a claim for damages on the grounds of Art. 36, para.2 of the Protection of Competition Act /repealed/, which was nevertheless in effect by the date of the institution of the proceedings. The quoted provision conditions the admissibility of the claim lodged.

According to the Appellate Court, in order for the claim for payment of damages to be substantiated, it is necessary to prove unlawful behaviour on the part of the defendant, the damage suffered by the plaintiff, and the causality between these events. In this case, it is argued that the damage consists of lost profits caused by the limitation of the opportunities for the plaintiff to earn profits from the ‘dial-up Internet access’ service. The aforementioned conclusions of the expert witness – accountant state that, in the period 2000–2004, the revenue of I.B. AD that came from the provision of ‘dial-up Internet access’ service dropped considerably. However, it was not found that this drop in revenue was caused solely and only by the violation of Art. 18, item 1, of the Protection of Competition Act /repealed/ on the part of the Bulgarian Telecommunications Company EAD.

Given the aforementioned considerations, the Appellate Court found that, by dismissing the claim, the First-Instance Court delivered a substantiated and lawful judgment, which should remain in effect.

As a final result, the Sofia Appellate Court confirmed the judgment of the Sofia City Court.

Comment

As the Court stated, it cannot be assumed as being a proven fact that the monopoly behaviour of the Bulgarian Telecommunications Company EAD is the sole market factor to negatively affect the revenues of Internet service providers. In a period of rapid free market development there can be many and various reasons for a diminished interest in a given service. It is a well-known fact, not requiring proof, that the introduction of cable Internet as an alternative to dial-up Internet access has changed users' interests. Given this case, the degree to which the Bulgarian Telecommunications Company EAD has violated competition regulations, as found by the Commission for the Protection of Competition, cannot be proven.

6.5. Dimitrov Chavdar (Bourgas Administrative Court, Bulgaria), *Ethna Cargo v. Bulgarian Competition Authority*

- **Decision № 6217 of 08.05.2013 on Administrative Case № 3099/2013, of a 5-member panel of the Supreme Administrative Court (SAC) regarding the appeal of**
- **Decision № 15743 of 11.12.2012 on Adm. Case № 9247/2012, of a three-member panel of the SAC, by virtue of which was confirmed**
- **Decision № 659/14.06.2012 on Case 408/2012 of the Commission for Protection of Competition (CPC).**

Facts

The case under consideration aims to establish the lack or presence of the dominant position of one of the three mobile operators in the market for mobile phone services, and it is initiated by an ex-client of one of those operators - Cosmo Bulgaria Mobile JSC (acting with the brand name Globul), which is now a current client of another of them - Bulgarian Telecommunication Company JSC (Vivacom). The struggle between all the three mobile operators in Bulgaria, amongst which is also Mobiltel JSC (with the brand name Mtel) has continued for years and is always about the infringement of the rules of fair competition, and, in particular, of the abuse of a dominant position with respect to particular services and markets.

What is different and specific about this particular case is that the procedure of the Commission for the Protection of Competition (hereinafter referred to as the Commission) is initiated by a third party which is not a participant in the market for mobile services, but a client named Ethna Cargo Ltd, which had sent a request to the Commission with the purpose of establishing infringements under Article 21 of the Protection of Competition Act (similar to Art. 102 TFEU) committed by Cosmo Bulgaria Mobile JSC/Globul, in connection with preventing their clients from the possibility of terminating their contracts and signing up with the other participants in the market by foreseeing penalties of great value in the case of contract termination.

Cosmo Bulgaria Mobile JSC, which is a defendant in the proceedings before the Commission and the Court, is a company that provides public electronic communication networks and services;

There are three companies registered in compliance with the procedure of the Electronic Messages Act in Bulgaria, and operating on the market for access to mobile land networks and the provision of mobile voice telephone services through them. Officially all the three companies act in competition with each other.

By its earlier decisions the Communications Regulation Commission determined that Mobiltel and Globul are dominant operators in the mobile voice services market, taking into consideration their market share – more than 25 per cent of the respective market. Cosmo Bulgaria Mobile JSC was also determined to be an enterprise with a significant influence on the whole sales market. This had been ruled by a number of decisions of the Commission for the Protection of Competition in the period 2006 – 2008.

However, at a later time there are plenty of cases where the Commission, such as 1340/2011; 861/2011; 774/2010; 170/2010; 1264/2009 says that the dominant position of those two operators

(Mobiltel and Globul) no longer exists, because of the increasing influence and market share, as well as the increasing income of the third operator soon after being empowered, and because of its technical capacity to service as many clients as the other operators, so that now Globul is only the second most powerful company among the three in a market with an oligopolistic structure in Bulgaria.

Ethna Cargo Ltd. is an international transport company which has been a client of Globul since 2004. On 21.12.2010 their business relations were rearranged by a term contract for a period of 12 months, with a clause for automatic renovation of that period in the case of non-termination of the contract. At the end of that period, Globul was informed by Ethna Cargo that it would like to terminate the contract but to keep its telephone numbers and use them in another mobile contract, which Ethna Cargo intended to negotiate with the operator Vivacom.

Under those circumstances, Globul offered better conditions for the contract (cheaper prices, minutes for free etc.), so that Ethna Cargo decided that the term of the contract with Globul be automatically prolonged, but after the prolongation Globul refused to contract under the promised conditions.

This was the reason for Ethna Cargo terminating the contract, but the company was charged an unreasonably large amount of money which would actually prevent, according to the company, every client from terminating the contract, unless he were as frustrated as Ethna Cargo.

On the grounds of the above events the claimant, Ethna Cargo, asserted that there a dominant position exists, by which Cosmo Bulgaria Mobile JSC has committed abuse, according to the meaning of Article 21 of the Protection of Competition Act (respectively Art. 102 TFEU) by setting such a large amount of penalties that actually prevented their clients from terminating their contracts, no matter how dissatisfied with the conditions they were.

The Decision of the Bulgarian Competition Authority

The Commission has reached the conclusion that in the specific mobile services market there is no company with a dominant position, which would make such a company independent of both other competitors who are participating in the competition.

It is assumed that, in the presence of the oligopolistic structure of the type of market represented no company involved in the relevant market is able to impose its own market conduct. Its lack of a dominant position, irrespective of the market share, always makes it dependent from the market response of each individual participant, as the other two competitors have sufficient market power to respond appropriately to potential competitive pressures.

According to the Commission, one of the preconditions for abuse of a dominant position under Article 21 of the Protection of Competition Act is missing, because Globul does not have a dominant position, within the meaning of the Act, with regard to this market. The lack of a market participant holding an independent power with a view to its market share, level of technological development, financial resources and market access capability, to ignore its competitors, leads to the lack of the mentioned infringement.

The Ruling of the Supreme Administrative Court

The decision of the Commission on the Protection of Competition was confirmed by the Supreme Administrative Court in two instances, disagreeing only with the statement of the Commission that such a dominant position in an oligopolistic market is practically and theoretically impossible.

The Court assumed that an oligopolistic market is characterised by a small number of players, with relatively equal market shares among the participants in the oligopoly. None of them is able to have a fully independent market behaviour. When all firms are of equal size, oligopoly is symmetrical. In the case of a prominent leader in the oligopolistic market (dominant undertaking) there is an asymmetric oligopoly. In the present case, it is assumed that there is an oligopoly of a symmetrical structure of the shares of market participants, because there is no prominent market leader which, according to the Court and the Commission, excluded the existence of a dominant position of Globul.

The case mentioned above is important because of its deviation from the practice of the ECJ and the First instance court upon the matters of the oligopolistic market, especially in the following cases *Airtours/Commission*, T-342/99, *Recueil*; C-413/06 etc., where the problem of joint dominance is being explored. According to the Court's opinion in the last mentioned case:

120. In the case of an alleged creation, or the strengthening of a collective dominant position, the Commission is obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to will lead to a situation in which effective competition in the relevant market is significantly impeded by the undertakings which are parties to the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market (see *Kali & Salz*, paragraph 221) in order to profit from a situation of collective economic strength, without actual or potential competitors, let alone customers or consumers, being able to react effectively.

121 Such correlative factors include, in particular, the relationship of interdependence existing between the parties into a tight oligopoly within which, on a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct on the market in such a way as to maximise their joint profits by increasing prices, reducing output, the choice or quality of goods and services, diminishing innovation or otherwise influencing the parameters of competition. In such a context, each operator is aware that highly competitive action on its part would provoke a reaction on the part of the others, so that it would derive no benefit from its initiative.

122 A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration to those characteristics that the concentration would entail, the latter would make each member of the oligopoly in question, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

123 Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

Comment

In the Bulgarian case presented above, there is plenty of evidence about a similar behaviour among the three companies on the market of mobile services in Bulgaria. Instead of checking out the contract penalties of the other two companies and comparing all the important elements of the contracts of all the three companies, such as terms, prices, extras etc. which would help the Commission and the Court to notify the existing correlation of those characteristics in the contracts, The Court and the Commission regarded Globul as a separate and independent entity though participating on a market absolutely similar to that mentioned in C-413/2006 case where the question about the existence of abuse of dominant position is very often equal to that of the existence of collective dominant position situation where a small number of companies on an oligopolistic market controlled by the State, offer contracts with similar and almost equal terms and conditions to their clients. It is not always said such a dominance to exist but at least that should be verified.

As a conclusion I would say that this case is more interesting on local level than on EU Level but it shows the often met misunderstanding of the problems of competition by the Commission for Protection of Competition in Bulgaria.

6.6. Patrizia Puccini (Venice Court of Appeal, Italy), *CETEL S.N.C. and others v. ENEL S.p.A.*

Judgment of the Italian Supreme Court N.3638/09, issued on 21st October, 2008.

Introduction

The proceeding of the First Instance was held before the Court of Appeal of Bari in as much as it was exclusively competent pursuant to Art. 33, Law n. 287/1990.

The ruling of the Court was challenged before our Supreme Court, which overturned the previous decision, sending the parties once again before the Lower Court in order to reach a decision based on a different definition of the relevant market.

Facts

Some companies operating in the field of contracts that are related to the construction and maintenance of electrical systems on behalf of Enel Spa, Naples section, sued Enel before the Court of Appeal of Bari, asking to declare as null contractual clauses relating to pricing, due to the abuse of monopoly power in the production, transport, distribution and sale of electricity, and they demanded their re-determination.

They also denounced the abuse of economic dependence that had been caused by Enel to the above-mentioned companies which, in the Puglia Region, were operating almost exclusively on behalf of Enel.

They therefore cited a violation of Article 82 of the EU Treaty and Art. 3, Law N. 287/1990, prohibiting the abuse of dominant position.

Enel observed the absence of the conditions for the application of Law n. 287/1990, a relevant market not having being identified in the field of the installation and maintenance of electrical systems at low and medium voltage, and suggested that any abusive conduct on its part was non-existent.

The Ruling of the Court Of Appeal

The Court of Appeal rejected the merits of the plaintiffs' claim and ruled that there was no abuse of dominant position on the assumption that the proper definition of the relevant market be taken on the basis of a technical report (CTU), so with no reference to contracts for the installation or maintenance of power lines for medium and low voltage, but with reference to the entire market for building works.

The Court held that it is not possible to refer to a 'specific market for the construction of overhead and underground lines and execution of civil works and laying underground cables exclusively aimed at the transmission of electric power', and that it could consequently not 'identify a dominant position for Enel as regards the sectors mentioned above'.

The CTU found that most of the plaintiffs' undertakings fell under categories ANC, different from those that stuck specifically to works on electrical systems of medium and low voltage (i.e., 16 H), that that part of the turnover of the undertakings concerned works different from those relating to the plants in question, and that the necessary equipment for carrying out the work in question was employable in the preparation of civil works of various kinds.

In addition, some of the firms that were suing had conducted work in a geographical area that was not limited to the Puglia Region, and the demand for the execution of works of excavation and maintenance for a network in the Puglia Region came not only from Enel, but also from local government and from other companies that managed network plants.

Neither from the point of view of the demand, nor from the point of view of the supply, was a specific and/or significant market concerning contracts for the installation and maintenance of electrical lines of medium and low voltage found in the Puglia Region.

The appellants relied on the breach and misapplication of the standards referred to by Art. 3, Law N. 287/1990 (National Antitrust Law), in relation to Art. 1, paragraph 4, of the same Act, with reference to the principle according to which the relevant market in which to tailor the position of the firm responsible for the abuse consisted in the 'smallest group of products and the smallest geographical area for which the creation of a dominant position is possible, because of the given situation.'

The appellants observed also that it is common knowledge that the relevant market should be identified by the set of economic transactions in which significant changes in the competitive tender can occur. Transactions that are considered suitable for inclusion in a given market are classified mainly according to the product being traded and the place where the exchange can be realised.

This principle is used to delimit the relevant economic context affecting both the product and the geographical markets. If a characteristic of these transactions appears likely to separate one set of transactions from another, to bring them back to a more restricted context than that identified by sectorial and geographical distinction, this feature becomes essential in establishing the correct extension of the relevant market.

The relevant market could not be identified with reference to all the economic transactions associated with the execution of civil works of any kind, and at a larger level than the market in the Puglia Region, but only with respect to transactions between Enel and the applicants.

The Ruling of the Supreme Court

Our Supreme Court has ruled in the sense that the identification of the target market, commonly referred to as the 'relevant market', is preliminary and is essential for the assessment of any anti-competitive conduct and assumes central importance for abuse offences, such as for concentrations, given that, for the detection of both cases, checking the position that the companies hold on the market stands as being preliminary.

However, it is clear that to perform this investigative action it is necessary to first define the scope of the market in which the position should be checked, since the larger the market to which we relate, the lower the degree of dominance that the company can play, while, on the contrary, the more restricted the relevant market, the greater can be the part played by the undertaking considered.

For the purpose of defining the relevant market, it is necessary to take into account the geographical area in which the transaction is placed, or in which it is assumed to produce a noticeable effect (the geographical market) and the scope of the product or service that involves the same operation (the product market).

Each antitrust system operates in a certain market and must therefore identify the territorial scope with respect to which the legislation may have specific anti-competitive effects.

With regard to the antitrust laws, for the definition of relevant market we must refer to the *Communication from the Commission* on the definition of the relevant market for the purposes of the Community law in the field of competition (in OJ C 372 of 9.12.1997) and to the parameters that the

national and the Community law consider to be essential to the definition of the relevant market, namely the substitutability on both the demand and the supply sides.

The Communication under examination indicates the relevant product market as being that ‘which comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of products, characteristics, prices and intended use’ (paragraph 7 of the Notice.)

The relevant geographical market comprises the area in which the undertakings involved provide or buy products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in the latter, the conditions of competition are appreciably different (point 8 of the Communication).

The Communication states that as a dominant position it intends one that allows one company or group of companies to determine their own conduct to an appreciable extent, independently of its competitors, its customers and, ultimately, of the final consumers of its products or services.

Furthermore, it notes that substitutability on the demand side constitutes the most immediate and effective disciplinary bond for the suppliers of a given product, especially with regard to their decisions on price. An undertaking or group of undertakings (Enel, in this case) cannot significantly influence the conditions of sale and, in particular, of prices, if customers (read ‘the applicants’) are able to easily switch to available substitute products on the market (see tenders for the execution of other jobs).

With regard to the substitutability on the supply side, it is necessary to determine whether, in the face of a small but permanent increase in the price of the referenced product, there are companies which, despite being active in the production of non-fungible assets, are nevertheless capable of producing the good in question, converting its production capacity over a short period of time and without facing huge investments.

Products that are characterised by a very marked degree of affinity and that are manufactured based on the same technology, for which a conversion of production capacity is realistically attainable in the short term and without significant additional costs, can be considered as being substitutable.

The market can thus be defined as the territory in which all traders are found in similar conditions of competition, specifically in the relevant products or services considered, identifying them according to their characteristics and to the needs that are worth satisfying.

So, the first task is to check that the products or services must be perceived as being substitutable by the consumer, not only for their technical and functional characteristics, but also for the levels of their prices.

On the supply side, however, attention must be given not only to all the firms in a certain industry, but also to those that may operate in it in view of the possibility of a conversion that is economically and commercially advantageous.

However, the Court observed, there are many cases in which the Community Courts have limited the definition of the relevant market with reference to the specific market segment which was the subject of significant transactions that were under investigation.

On the one hand, it seems that too broad a market, such as that for civil works in general, has been considered; on the other, the market for the execution of works of the excavation and maintenance of network plants in the Puglia Region must be considered in depth (in fact, in this sector the demand comes not only from Enel, but also from local public administrations and other enterprise management systems in the network).

In this case, however, whether Enel was or was not in a dominant position should have been investigated with reference to the market share held by each entity in that market.

The question is, in fact, not to determine whether Enel is monopolistic in that market, but whether it is in a dominant position with respect to the shares held by other operators.

The ruling of the Bari Court does not take into account the possibility that the relevant market that could be referred to in this case was not so specific, that is, limited to transactions between the parties, but instead a little larger, that is, the market for the execution of works for the excavation and maintenance of a network in the Puglia Region.

The latter was indicated by the CTU in their market considerations, but it seems the Court did not take into account additional considerations regarding the position of Enel.

The fact highlighted in the judgment challenged, that the appellants have also worked in other areas and for other companies, does not exclude that there might still be a dominant Enel position in the specific market in which the companies specialised.

In fact, it was not necessary to demonstrate that Enel was the only company able to offer work to specialised companies but, rather, that Enel held a position of prominence, such as to decisively influence the choices of the other subjects of the contracts. The matter was therefore to define the shares held by Enel compared to other possible offers that were available to the applicants in the market in relation to their specialisation.

With regard to the geographical market, the judgment under appeal did not take the responsibility of clarifying whether it intended to refer to the national market or to a part of it: sometimes it mentions the Puglia Region, at other times the Centre-north, but in any case there is no clear stance on the matter.

A proper definition of the relevant market cannot be separated from the identification of the target market in terms of territory, as well as in terms of the products and/or services considered.

The Court ruled also on the problem of the exemption, pleaded by Enel's defence, regarding the applicability of the provision referred to in Law. N. 287 1990, Art. 8.

Pursuant to this article 'The provisions of the preceding Articles shall not apply to undertakings which, in the eyes of the law, exercise the operation of services of general economic interest or operate a monopoly on the market, for all that closely relate to the fulfilment of specific tasks entrusted to them'.

The Supreme Court observes that it must be denied that undertakings carrying out services of general interest can be, for that reason only, exempt from the antitrust rules.

It must be stated that a prerequisite for the effectiveness of the provision invoked is that the conduct that is the subject of the complaint was raised as being closely linked to the fulfilment of specific tasks entrusted to a firm engaged in the operation of services of general economic interest.

There was no evidence which suggested that the behaviour took place as the only possible behaviour in order to pursue Enel's institutional mission in energy.

The burden of proof was on Enel.

Comment

This judgment is very interesting, since it defines in absolutely clear and precise terms the notion of a 'relevant market' with reference, in particular, to the position of companies operating in a wide geographical area in which services of public interest operate.

The definition of the relevant market, in both its product and geographical dimensions, allows the market operators (suppliers, customers, consumers) to be identified. On that basis, the total market size

and the market share of each supplier can be calculated with reference to their sales of the relevant product in the relevant area.

Companies' estimates, studies commissioned from industry consultants or trade associations, or the companies' turnover figures can help to calculate the total market size and the market share of each supplier. If sales are usually the reference whereby market shares are calculated, there are nevertheless other indicators that, depending on the specific products or industry in question, can provide useful information, such as capacity and the number of players in bidding markets, etc.

The conclusion is that the interpretation of data and the judicial assertions of both the product and relevant geographical markets are complex economic issues that carry too many possibly relevant markets for the purposes of administering justice. As stated above, the best that the courts can do is to identify many relevant markets for one product and to ascertain whether there is inelasticity in at least one of them.

In our case, the question is whether the proper solution was not to consider as a relevant market that for the execution of works of excavation and the maintenance of a network in the Puglia region, but that for an electricity and telecommunications network: in fact, the gas and water markets do not have the same players if compared with the second market.

7. List of Judges who participated to ENTraNCE Judges 2013

- Dimitrov Chavdar, Bourgas Administrative Court (Bulgaria)
- Mira Raycheva, Supreme Administrative Court (Bulgaria)
- Elisabete Assunção, Commercial Court (Portugal)
- Cláudia Roque, Competition Tribunal (Portugal)
- Helena Nogueira, Competition Tribunal (Portugal)
- Andzej Maciejewski, Vilnius Regional Court (Lithuania)
- Ambrasaitė Goda, Vilnius Regional Court (Lithuania)
- Žalimienė Skirgailė, Supreme Administrative Court (Lithuania)
- Janis Neimanis, Supreme Court (Latvia)
- Iannis Symplis, Supreme Administrative Court (Greece)
- Dimitrios Titsias, First Instance Court of Larissa (Greece)
- Petr Kosik, District Court of Usti nad Labem (Czech Republic)
- Elena Diana Ungureanu, Court of Appeal of Pitesti (Romania)
- Brian McGovern, High Court (Ireland)
- Colm Mac Eochaidh, High Court (Ireland)
- Patrizia Puccini, Venice Court of Appeal (Italy)
- Lorenza Calcagno, Court of Genoa (Italy)
- Agnieszka Pieńkowska, District Court of Myszków (Poland)
- Francisco Paneda Usunariz, Gijon Commercial Court (Spain)
- Angel Galgo, Court of Appeal of Madrid (Spain)
- Márta Dóczy, Budapest Metropolitan Tribunal (Hungary)
- Csilla Szabó, Budapest Metropolitan Court (Hungary)
- Madis Ernits, Tartu District Court (Estonia)
- Fatma Senol Bedevi, Nicosia District Court (Cyprus)
- Jana Zemkova, Supreme Court (Slovakia)

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